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THE
AMERICAN DECISIONS

CONTAINING ALL THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED BY

JOHN PROFFATT, LL. B.,

Author of "A Treatise on Jury Trial," etc.

Vol. VII.

SAN FRANCISCO:

BANCROFT-WHITNEY CO.

LAW PUBLISHERS AND LAW BOOKSELLERS.

1886.

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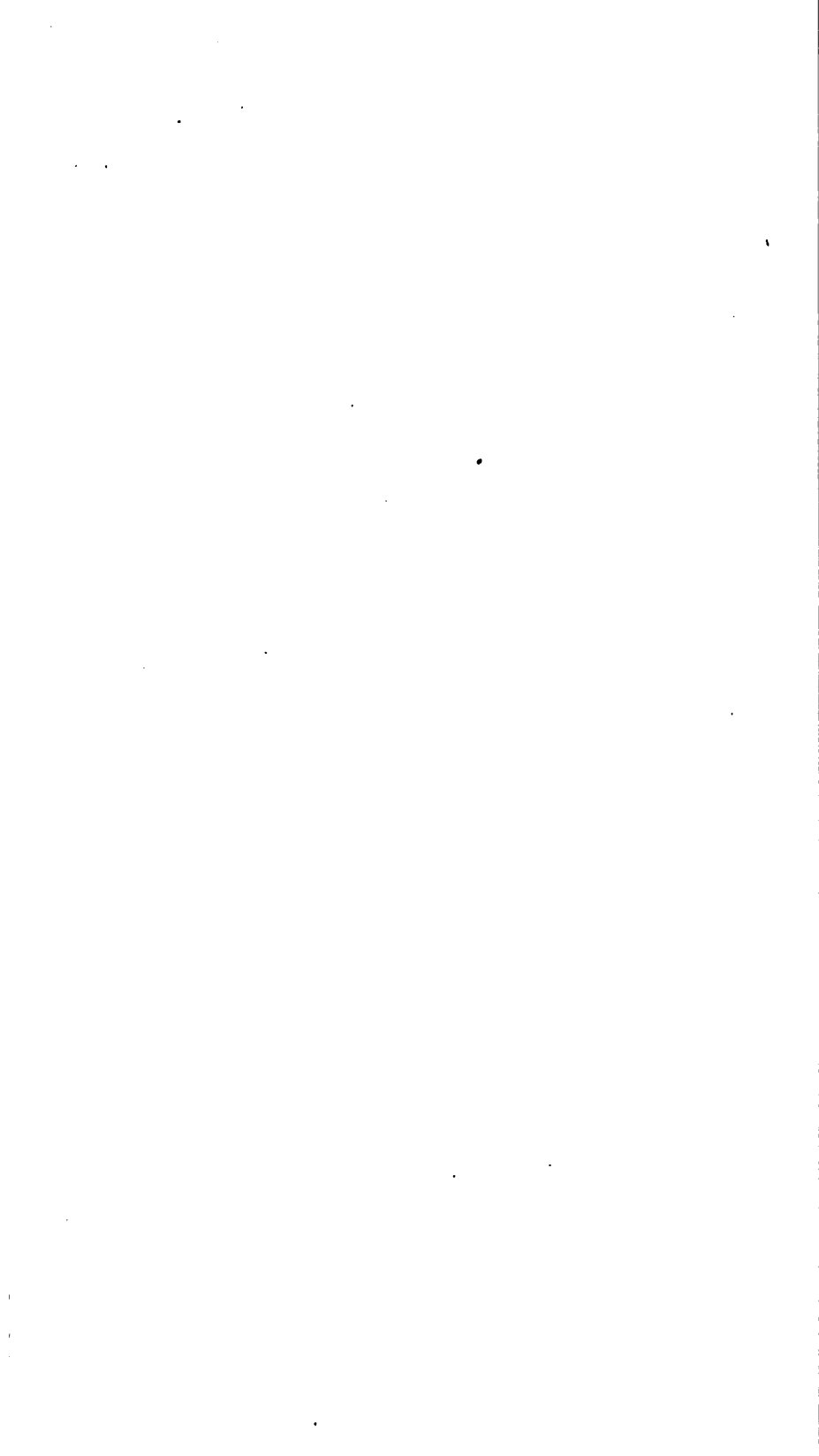
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AMERICAN DECISIONS.

VOL. VII.

The cases re-reported in this Volume will be found originally reported in the following State Reports.

MASSACHUSETTS REPORTS.	- - - -	Vols. 12 to 14.	1815-1817.
CONNECTICUT REPORTS.	- - - -	Vols. 1, 2.	1816-1817.
JOHNSON'S NEW YORK REPORTS.	- - -	Vols. 12 to 14.	1815-1817.
JOHNSON'S CHANCERY REPORTS	- - -	Vols, 1, 2.	1814-1817.
SOUTHARD'S NEW JERSEY REPORTS	- -	Vol. 1.	1816-1818.
SERGEANT & RAWLE'S PENN. REPORTS	-	Vols. 1, 2.	1814-1816.
HARRIS & JOHNSON'S MARYLAND REPORTS.		Vol. 4.	1818-1819.
MURFORD'S VIRGINIA REPORTS.	- -	Vol. 5.	1816-1817.
NORTH CAROLINA TERM REPORTS.	- -	Vol. 1.	1816-1817.
BIRD'S KENTUCKY REPORTS.	- - -	Vol. 4.	1815-1817.



AMERICAN DECISIONS.

VOL. VII.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Abbott v. Allen.....	<i>Real estate</i>	2 Johns. Ch.	554
Abeel v. Radcliff.	<i>Landlord and tenant</i> 13	Johnson... ..	377
Adams v. Bean.....	<i>Guaranty</i>	12 Mass.....	44
Adams v. Freeman.....	<i>Trespass</i>	12 Johnson.....	327
Adams v. Howe.....	<i>Statutes</i>	14 Mass.....	216
Adsit v. Adsit.....	<i>Dower</i>	2 Johns. Ch	539
Allen v. Trimble	<i>Evidence</i>	4 Bibb	726
Anderson v. Drake.....	<i>Neg. instruments</i> ... 14	Johnson.....	442
Arnold v. Camp.....	<i>Partnership</i>	12 Johnson	328
Austin v. Hall.....	<i>Release</i>	13 Johnson.....	376
Avery v. Stewart	<i>Neg. instruments</i> ... 2	Conn	240
Bancroft v. Wardwell	<i>Landlord and tenant</i> 13	Johnson	396
Barnard v. Pope	<i>Evidence</i>	14 Mass.....	225
Barney v. Dewey.....	<i>Sales</i>	13 Johnson	372
Barney v. Prentiss	<i>Com. carriers</i>	4 Harris & J....	670
Barney v. Smith	<i>Partnership</i>	4 Harris & J....	679
Bartlet v. Harlow.....	<i>Executions</i>	12 Mass.....	78
Bartlet v. King	<i>Charitable uses</i>	12 Mass.....	99
Bartlet v. Walter	<i>Insurance</i>	13 Mass.....	143
Barton v. Baker	<i>Neg. instruments</i> ... 1	Serg. & R	620
Belknap v. Belknap	<i>Eminent domain</i> ... 2	Johns. Ch....	548
Benedict v. Lynch	<i>Sp. performances</i> ... 1	Johns. Ch	484
Betts v. Badger.....	<i>Evidence</i>	12 Johnson.....	309
Blanchard v. Russell	<i>Insolvent laws</i>	13 Mass.....	106
Bracket v. McNair	<i>Damages</i>	14 Johnson.....	447
Bradford v. Manly	<i>Sale by sample</i>	13 Mass.....	122
Brewer v. Union Ins. Co.....	<i>Insurance</i>	12 Mass.....	53
Bridge v. Eggleston	<i>Fraud. conveyance</i> . 14	Mass.....	209
Brower v. Wooten	<i>Neg. instruments</i> ... N. C. Term Rep..		692
Back v. Cotton	<i>Neg. instruments</i> ... 2	Conn	251
Balkley v. Derby Fish Co	<i>Corporations</i>	2 Conn.....	271
Buntun v. Worley	<i>Slander</i>	4 Bibb	725

NAME.	SUBJECT.	COURT.	PAGE.
Chaddock v. Briggs.....	<i>Slander</i>	13 Mass.....	137
Chalmers v. McMurdo.....	<i>Neg. instruments</i> ...	5 Munford.....	684
Chapman v. Chapman.....	<i>Evidence</i>	2 Conn.	277
Cheesebrough v. Millard.....	<i>Contribution</i>	1 Johns. Ch....	494
Christ v. Dittenbach.....	<i>Evidence</i>	1 Serg. & R....	624
Clute v. Wiggins.....	<i>Innkeeper</i>	14 Johnson.....	448
Colburn v. Richards.....	<i>Easements</i>	13 Mass.....	160
Commonwealth v. Bowen.....	<i>Murder</i>	13 Mass.....	154
Commonwealth v. Knight.....	<i>Perjury</i>	12 Mass.....	72
Commonwealth v. McGowan.....	<i>Stat. of limitations</i> ..	4 Bibb.....	737
Commonwealth v. Sharpless.....	<i>Criminal law</i>	2 Serg. & R....	632
Connecticut v. Jackson.....	<i>Interest</i>	1 Johns. Ch....	471
Couch v. Meeker.....	<i>Escrows</i>	2 Conn.....	274
Dearth v. Williamson..	<i>Deeds</i>	2 Serg. & R....	652
Dorsey v. Jackman.....	<i>Real estate</i>	1 Serg. & R....	611
Dunscornb v. Dunscornb.....	<i>Executors</i>	1 Johns. Ch....	504
Dutchess M'fg. Co. v. Davis.....	<i>Corporations</i>	14 Johnson.....	459
Emerson v. Prov. Hat Co.....	<i>Agency</i>	12 Mass.....	66
Farmington Academy v. Allen....	<i>Contracts</i>	14 Mass.....	201
Farnum v. Fowle.....	<i>Neg. instruments</i> ...	12 Mass.....	35
Fentress v. Robins.....	<i>Injunctions</i>	N. C. Term Rep..	704
Firemen's Ins. Co. v. Walden....	<i>Insurance</i>	12 Johnson.....	340
Flint v. Sheldon.....	<i>Evidence</i>	13 Mass.....	162
Gale v. Ward.....	<i>Fixtures</i>	14 Mass.....	223
Gardner v. Newburgh.....	<i>Water-courses</i>	2 Johns. Ch....	526
Gardner v. Thomas.....	<i>Marine torts</i>	14 Johnson.....	445
Garlick v. James.....	<i>Pledges</i>	12 Johnson.....	294
Gayetty v. Bethune.....	<i>Easements</i>	14 Mass.....	168
Gillespie v. Moon.....	<i>Mistake</i>	2 Johns. Ch....	559
Gray v. Wain.....	<i>General average</i>	2 Serg. & R....	642
Green v. Kemp.....	<i>Mortgages</i>	13 Mass.....	169
Green v. Winter.....	<i>Trustees</i>	1 Johns. Ch....	475
Gregory v. Brown.....	<i>Judicial liability</i>	4 Bibb.....	731
Guthrie v. Wickliffe.....	<i>Interest</i>	4 Bibb.....	746
Hanover v. Turner.....	<i>Divorce</i>	14 Mass.....	203
Harvy v. Pike.....	<i>Com. carriers</i>	N. C. Term Rep..	698
Haslen v. Kean.....	<i>Powers</i>	N. C. Term Rep..	718
Hills v. Eliot.....	<i>Mortgages</i>	12 Mass.....	26
Homes v. Dana.....	<i>Contracts</i>	12 Mass.....	55
Howatt v. Davis.....	<i>Stopp. in transitu</i> ..	5 Munford.....	681
Hundley v. Lyons.....	<i>Real estate</i>	5 Munford.....	685
Ingraham v. Geyer.....	<i>Insolvent laws</i>	13 Mass.....	132
Jackson v. Delancy.....	<i>Real estate</i>	13 Johnson.....	403
Jackson v. Goes.....	<i>Land patents</i>	13 Johnson.....	399

CASES REPORTED.

5

NAME.	SUBJECT.	REPORT.	PAGE.
Jackson v. Hare.....	<i>Land patents</i>	12 Johnson.....	280
Jackson v. Moore	<i>Real estate</i>	13 Johnson.....	398
Jackson v. Wood	<i>Mortgages</i>	12 Johnson.....	315
Jennings v. Camp.....	<i>Contracts</i>	13 Johnson.....	367
Jewett v. Warren.....	<i>Sales</i>	12 Mass.....	74
Jones v. Gibson.....	<i>Tax sales</i>	N. C. Term Rep.	690
Jones v. Zollicoffer.....	<i>Equity</i>	N. C. Term Rep.	705
Ketchum v. Evertson	<i>Performance</i>	13 Johnson.....	384
Kington v. Wharton.	<i>Insolvent laws</i>	2 Serg. & B.....	638
Lamb v. Durant.....	<i>Partnership</i>	12 Mass.....	31
Laspeyre v. McFarland.....	<i>Trover</i>	N. C. Term. Rep.	705
Leggett v. Blount.....	<i>Probable cause</i>	N. C. Term. Rep.	702
Little v. Moore	<i>Judicial liability</i> ...	1 Southard.....	574
Lloyd v. Keach.....	<i>Usury</i>	2 Conn.....	256
Long v. Merrill.....	<i>Equity</i>	N. C. Term. Rep.	700
Lord v. Dall.....	<i>Life insurance</i>	12 Mass.....	38
Low v. Mumford.....	<i>Torts</i>	14 Johnson.....	469
Mann v. Mann.....	<i>Wills—evidence</i>	14 Johnson.....	416
Martin v. Stillwell.....	<i>Slander</i>	13 Johnson.....	374
McWilliams v. Nialy.....	<i>Estoppel</i>	2 Serg. & B.	654
McMillan v. Vanderlip	<i>Contracts</i>	12 Johnson.....	299
Merritt v. Clason	<i>Statute of Frauds</i> ..	12 Johnson.....	286
Monell v. Colden	<i>Fraud</i>	13 Johnson.....	390
Moses v. Murgatroyd.....	<i>Trustees</i>	1 Johns. Ch.....	478
Murray v. Bogart	<i>Partnership</i>	4 Bibb.....	466
Oliver v. Houdlet.....	<i>Infancy</i>	13 Mass.....	134
Osgood v. Franklin.....	<i>Executors</i>	2 Johns. Ch.....	513
Oystead v. Shed.....	<i>Arrest</i>	13 Mass.....	172
Pain v. Packard	<i>Suretyship</i>	13 Johnson.....	369
Palmer v. Hand	<i>Sales</i>	13 Johnson.....	392
Parkhurst v. Van Cortland.....	<i>Specific performance</i>	14 Johnson.....	427
Payne v. Rodden.....	<i>Pleading</i>	4 Bibb.....	739
Pease v. Folger	<i>Insolvent laws</i>	14 Mass.....	213
People v. Anderson	<i>Larceny</i>	14 Johnson.....	462
People v. Herrick.....	<i>Evidence</i>	13 Johnson.....	364
Phillips v. Thompson.....	<i>Neg. instruments</i> ...	2 Johns. Ch.....	535
Pike v. Thomas.....	<i>Contracts</i>	4 Bibb.....	741
Pomeroy v. Winship	<i>Foreclosure</i>	12 Mass.....	91
Porter v. Rose.....	<i>Pleading</i>	12 Johnson.....	306
Post v. Munn.....	<i>Fishing rights</i>	1 Southard	570
Potts v. Imlay.....	<i>Mal. prosecution</i> ...	1 Southard.....	603
Raymond v. Bearnard	<i>Contracts</i>	12 Johnson.....	317
Ritchie v. Moore.....	<i>Neg. instruments</i> ...	5 Munford	688
Roberts v. Turner.....	<i>Common carriers</i> ..	12 Johnson.....	311
Ruggles v. Lawson.....	<i>Deeds—delivery</i>	13 Johnson.....	375

NAME.	SUBJECT.	REPORT.	PAGE.
Salmon v. Bennett	<i>Fraud, conveyances</i>	1 Conn.....	237
Saltus v. Ocean Ins. Co.....	<i>Shipping</i>	12 Johnson.....	290
Sandford v. Nichols	<i>Search warrants</i>	13 Mass.....	151
Scott v. McAlpin	<i>Agency</i>	N. C. Term Rep.	703
Scott v. Price	<i>Executory devise</i>	2 Serg. & B.	629
Sooville v. Canfield.....	<i>Conflict of laws</i>	14 Johnson.....	467
Schieffelin v. Stewart.....	<i>Interest</i>	1 Johna. Ch.....	507
Shippey v. Henderson.....	<i>Pleading</i>	14 Johnson.....	458
Singstack v. Harding.....	<i>Statute of frauds</i>	4 Harris & J....	669
Sleighter v. Harrington.....	<i>Executors</i>	N. C. Term Rep.	715
Sloan v. Wilson.....	<i>Statute of frauds</i>	4 Harris & J....	672
Smith v. McLean	<i>Neg. instruments</i>	N. C. Term Rep.	693
Smith v. Whiting.....	<i>Neg. instruments</i>	12 Mass.....	25
Stanton v. Blossom.....	<i>Neg. instruments</i>	14 Mass.....	198
Starr v. Leavitt.....	<i>Executions</i>	2 Conn.....	268
State v. Aaron.....	<i>Infancy</i>	1 Southard.....	592
State v. Morris Turnpike Co.....	<i>Turnpikes</i>	1 Southard	579
Steigleman v. Jeffries.....	<i>Warranty</i>	1 Serg. & B.....	626
Stevens v. Cooper	<i>Evidence</i>	1 Johna. Ch.....	499
Stetson v. Kempton.....	<i>Taxation</i>	13 Mass.....	145
Story v. Odin.....	<i>Easements</i>	13 Mass.....	46
Strong v. Williams ..	<i>Bequest to creditor</i>	12 Mass.....	81
Tabb v. Harris.....	<i>Executions</i>	4 Bibb.....	732
Taft v. Montague.....	<i>Contracts</i>	14 Mass.....	215
Taney v. Kemp.....	<i>Witnesses</i>	4 Harris & J....	673
Taylor v. Adams.....	<i>Evidence</i>	2 Serg. & B.	665
Thurston v. Hancock.....	<i>Easements</i>	12 Mass.....	57
Tucker v. Woods	<i>Contracts</i>	12 Johnson.....	305
Van Bracklin v. Fonda	<i>Sales</i>	12 Johnson.....	339
Van Eps v. Schenectady.....	<i>Deeds</i>	12 Johnson.....	330
Van Riper v. Van Riper	<i>Verdict</i>	1 Southard.....	576
Vanuxem v. Hazlehurst.....	<i>Bankruptcy</i>	1 Southard.....	582
Van Valkinburgh v. Watson.....	<i>Infancy</i>	13 Johnson.....	395
Van Vechten v. Paddock	<i>Practice</i>	12 Johnson.....	303
Varnum v. Abbot.....	<i>Joint-tenancy</i>	12 Mass.....	87
Verplank v. Sterry.....	<i>Vol. conveyances</i>	12 Johnson.....	348
Vinton v. Bradford.....	<i>Attachment</i>	13 Mass.....	119
Walker v. Swartwout	<i>Agency</i>	12 Johnson.....	334
Wallace v. Duffield.....	<i>Trusts</i>	2 Serg. & B.....	660
Wardell v. Foedick	<i>Frauds</i>	13 Johnson.....	383
Watson v. Bioren	<i>Easements</i>	1 Serg. & B.....	617
Webb v. Duckingfield	<i>Shipping</i>	13 Johnson.....	388
Weston v. Barker	<i>Trusts</i>	12 Johnson.....	319
Wheeler v. Walker	<i>Conditional devise</i>	2 Conn.....	284
White v. Skinner.....	<i>Agency</i>	13 Johnson.....	381
White v. Wagner.....	<i>Waste</i>	4 Harris & J....	674
Whitney v. Dutch	<i>Infancy</i>	14 Mass.....	229

CASES REPORTED.

7

NAME.	SUBJECT.	REPORT.	PAGE.
Wiggin v. Amory	<i>Barratry</i>	14 Mass.....	175
Wiggin v. Bush.....	<i>Void contracts</i>	12 Johnson.....	324
Williams v. Grant	<i>Common carriers</i> ...	1 Conn.....	235
Williams v. Shaw.....	<i>Covenants in deed</i> ..	N. C. Term Rep.	706
Wood v. New England Ins. Co...	<i>Insurance</i>	14 Mass.....	182
Woodbridge v. Brigham	<i>Neg. instruments</i> ...	12 Mass.....	85
Worcester v. Eaton	<i>Dures</i>	12 Mass.....	155
Wyman v. Hallowell Bank.....	<i>Corporations</i>	14 Mass.....	194

CASES CITED.

	PAGE		PAGE
Able v. Newton	240	Bailey v. Ogden	388
Abercrombie v. Baldwin	229	Bainbridge v. Pickering	395
Aequakamunk Water Co. v. Wat-		Baker v. Day	451
son	533	Baker v. Kellogg	372
Adams v. Adams	548	Baker v. Marshall	371
Adams v. Briggs' Iron Co.	81	Baker v. Paine	563, 564, 625
Adams v. Clem	451, 455	Baker v. Union Mutual etc. Co. .	43
Adams v. Dyer	734	Baker v. Wheaton	112, 114
Agar v. Regents' Canal Co. .	530, 553	Ballatine v. Goulding	110, 111
Albany's case	723	Bane's case	715, 716, 718
Aldrich v. Cooper	496	Bangs v. Snow	149
Allen v. Bower	430	Banker v. Parker	251
Allen v. Crofoot	328	Bank of Metropolis v. Guttach-	
Allen v. Merwin	85	lick	484
Allen v. Taylor	745	Bank of U. S. v. Haskins	461
Alley v. Deschamps	490	Barber v. Root	207
Ambler v. Wild.	705	Barlow v. Lee Congregational So-	
Amherst Academy v. Cowls .	56, 203	ciety	71
Amundown v. Woodman	250	Barnard v. Adams	651
Andrews v. Essex etc. Ins. Co. .	569	Barnard v. Kellogg	129, 130
Andrews v. Gillespie	568	Barnes' case	519
Andrews v. Kneeland	131	Barnes v. Inhabitants etc. of Fal-	
Angus v. Dalton	63	mouth	221
Apperson v. Ford	558	Barrett v. Allen	250
Archer v. March	746	Barrow v. Barrow	363
Armfield v. Armfield	364	Barry v. Coombe	290
Armiger v. Clarke	485	Barry v. Morse	445
Armistead v. Wilde	455	Barstow v. Kilvington	565
Armroyd v. Union Ins. Co. .	645, 649	Bartholmew v. Bently	374
Armstrong v. Gibson	264	Bartlet v. Delprat	212
Armstrong v. Pierson	492	Barton v. Gray	493
Arnold v. Camp	330	Bassy v. Gallagher	532
Arnold v. Kempstead	544	Bassett v. Salisbury Mfg. Co.	534
Arnold v. United States	250	Batman v. Megowan	250
Ash v. Parkinson	223	Bayless v. Bussey	228
Ashley v. Ashley	194	Beale v. Warren	240
Atkins v. Hill	715	Bearce v. Barstow	170, 264
Atkins v. Rison	492	Beard v. Murphy	65, 66
Atkinson v. Webb	83	Beauchamp v. Mudd	739
Attorney-general v. Buller	414	Beaumont v. Fell	417
Attorney-general v. Meyrick	415	Becloe v. Alpee	304
Attorney-general v. Nichol	528	Bedell v. Stevens	374
Attorney-general v. St. Anbin .	559	Beebe v. Roberts	131
Attorney-general v. Tyndall	496	Beers v. Place	121
Austin v. Sawyer	503	Beirne v. Dord	128
Averill v. Loucks	484	Belden v. Lamb	263
Avery v. Inhabitants of Tying-		Bellasis v. Hester	250
ham	141	Bell v. Clapp	153
Babcock v. Bokler	362	Bell v. Cundale	567
Badlam v. Tucker	35	Bemis v. Leonard	250
Bailey v. White	121	Bendetson v. French	457
		Bennett v. Hamill	407

	PAGE		PAGE
Bennett v. Mellor	451, 454	Bridgewater Academy v. Gilbert.	203
Bennet v. Miller	449	Brinckerhoff v. Lansing	503
Bergen v. Bennett	518, 525	Brock v. Eastman	228
Berkshire Bank v. Jones	86	Brodie v. St. Paul	428
Berkshire Woolen Co. v. Proctor {	451	Bromley v. Jeffries	380, 485
Berry v. Harris	680	Brooker v. Coffin	143, 374
Beaford v. Saunders	639	Brook v. Brook	208, 209
Bevin v. Conn. etc. Ins. Co.	43	Broome v. Beers	256
Bigelow v. Wilson	250	Broughton v. Dewal	371
Bingham v. Bingham	556, 616	Brower v. Lewis	126
Binstead v. Coleman	501	Brown v. Austin	336
Birmingham v. Kirwan	547	Brown v. Backham	473
Bissell v. Cornell	375	Brown v. Bailey	81
Bixby v. Franklin Ins. Co.	35	Brown v. Brown	229, 543
Black & Itica R. R. Co. v. Clarke	462	Brown v. Butcher's Bank	289
Blagden v. Bradbear	436	Brown v. Carter	353
Blagden v. Bradlee	380	Brown v. Castles	392
Blasdal v. Babcock	373	Brown v. Crandall	279
Blaufo v. People	366	Brown v. Dawson	83
Bliss v. Greeley	534	Brown v. Harraden	261
Bloomer v. Waldron	525	Brown v. Perry	545
Blossman v. Brightman	81	Brown v. Ricketta	506, 513
Bodine v. Glading	492	Brown v. Selwyn	418
Bolton v. Lunday	371	Bryant v. Goodnow	56, 203
Bomier v. Caldwell	492	Bryant v. Isburgh	131
Bomley v. Frazier	261	Buckland v. Tankard	68
Bond v. Farnham	622, 623	Buck v. Hersey	142
Bonner v. Kennebec Purchase ..	227	Buffum v. Harria	534
Boorman v. Jenkins 126, 129,	130	Bull v. Allen	371
Booten v. Scheffen	492	Bumpus v. Platner	554, 558
Boraston's case	267	Bunnel v. Witherow	364
Borden v. Fitch	207	Burclacy v. Ellington	167
Borrekins v. Bevan	126	Burgess v. Clements	456
Boslock v. Blakeny	476	Burkhurst v. Fennar	612
Boston v. Worthington	373	Burlein v. Shannon	206
Bostwick v. Lewis	384	Burn v. Burn	565
Bottsford v. Burr	503	Burroughs v. Wright	121
Bowen v. Thrall	558	Burrows v. Smith	463
Bowen v. Waters	525	Burrows v. Trieber	454
Bowlin v. Pollock	558	Burton v. Nickerson	143
Bowman v. Bittenbender	569	Bush v. Cole	383
Boydell v. Drummond	360	Bush v. Western	528, 552
Boyden v. Boyden	234	Bussey v. Donaldson	699
Boyd v. Boyd	613	Butler v. Burleson	744
Boyd v. McLean	566	Button's case	465
Boyd v. Titzer	372		
Boyd v. Wilson	127	Cabot Bank v. Warner	201
Boynton v. Dyer	506, 513	Cain v. Gimon	264
Bradbury v. Bucks	472	Cain v. Henderson	613, 614
Bradford v. Farrand	119	Caldwell v. Porter	445
Bradford v. French	234	Call v. Hagger	116
Bradley v. Boynton	377	Callahan v. Donnelly	744
Bradshaw v. Hatch	207	Callender v. Ins. Co. of North	
Bragg v. Morrill	126	America	645, 649
Braman v. Howk	371	Calve's case	455
Brantley v. Thomas	126, 129	Campbell v. Galbreath	228
Brard v. Ackerman	262	Campbell v. Mesier	499
Braybroke v. Inskip	411	Campion v. Cotton	363
Bree v. Holbeck	616	Carpenter's case	691
Bremer v. Marshall	743	Carpenter v. Pier	373
Brewster v. Silence	503	Carpenter v. Providence Wash-	
Bridgeport v. Housatonic R. R. Co.	247	ington Ins. Co.	569
Bridges v. Shallcross	223	Carpenter v. Taylor	450
		Carpenter v. Thayer	229

CASES CITED.

11

	PAGE		PAGE
Carpentier v. Atherton.....	223	Cooking v. Pratt	564
Carr v. Howard.....	371	Cockshot v. Bennet.....	326
Carroll v. Carroll.....	548	Cohen v. Kyler.....	397
Carter v. Allen.....	714	Coles v. Trecothick.....	523
Carter v. Claycola.....	170	Colgrove v. Tallman	370, 499
Carter v. Crick.....	123	Collett v. De Gols.....	710
Carter v. Willard.....	76	Collins v. Buller.....	444
Cary v. Daniels.....	531	Colton v. Commissioners	223
Casborne v. Scarfe.....	414	Columbian Ins. Co. v. Ashley... 651	
Case of Levett.....	363	Commonwealth v. Byron.....	73
Cashill v. Wright.....	455, 456	Commonwealth v. Cooley.....	106
Castle v. Burditt.....	243	Commonwealth v. Mink.....	155
Caton v. Caton.....	442	Commonwealth v. Pollard.....	73
Cayle's case.....	449	Commonwealth v. Smith.....	74
Case v. Reilly.....	648, 651	Commonwealth Bank v. Varnum 251	
Central B. v. Allen.....	445	Conklin v. Conklin.....	372
Chambers v. Goldwin.....	473	Conn. Ins. Co. v. Schaefer.... 43, 44	
Chamberlain v. Chamberlain.... 472		Conrad v. Foy.....	371
Chamberlain v. Masterton.....	455	Conwell v. Pumphrey.....	264
Champlin v. Rowley.....	369	Cook v. Eaton.....	484, 503
Champion v. Plummer.....	486	Cook v. Oxley.....	306
Chandelor v. Lopus.....	123, 132	Cooke's case.....	364
Chandler v. Simmons.....	136	Coombe v. Miles.....	263
Chanoine v. Fowler.....	201	Cope v. Smith.....	371
Chapman v. Hart.....	421	Copeland v. Copeland.....	229
Chappel v. Brockway.....	743, 744	Cornay v. De Costa.... 255, 631, 622	
Charles v. Rankin.....	66	Corning v. Troy Nail Fac. ..532, 534	
Charles R. Bridge v. Warren Bridge.....	223, 534	Cortelyou v. Lansing.....	295, 296
Charter Oak, etc., Ina. Co. v. Brant.....	43	Corwin v. Davison.....	374
Chase v. Chase.....	206	Cosach v. Descondes.....	493
Chase v. Silverstone.....	553	Cotterel v. Hooke.....	641
Chasemore v. Richards.....	534	Cowles v. McVickar.....	264
Chatfield v. Watson.....	534	Cox v. Cox.....	492
Cheeseborough v. Van Shaick... 502		Cox's creditors.....	483
Cherry v. Stein.....	52	Coyles v. Higgins.....	731
Chesman v. Namby.....	743	Craig v. United Ins. Co.	54
Chesterfield v. Cromwell	473	Cram v. Hendricks.....	263
Cheyney's case.....	417, 418	Crawford v. Southern R. R. As'n 314	
Chisholm v. Nat. Capitol Ins. Co. 43		Crickmere's case.....	267
Chrisman v. Tuttle.....	372	Crickmere v. Paterson.....	267
Christenson v. American Ex. Co. 314		Crisp, ex parte.....	497
Christ's Church College case 104		Crocker v. Gilbert.....	46
Churchill v. Suter.....	260, 262	Cromwell v. Stephens.....	450
City of Quincy v. Jones	50, 65	Croninger v. Crocker.....	251
Clapp v. Bromagham.....	229	Crocker v. Crocker.....	330
Clapp v. Hanson.....	264	Crosby v. Fitch.....	237
Clark v. Clark.....	206	Crosby v. Middleton.....	565
Clark v. Conroe.....	534	Crounillat v. Ball.....	182
Clark v. Partridge.....	626	Culver v. Avery.....	374
Clark v. Wright.....	380	Cunningham v. Morrell.....	302
Clarke v. Rochester.....	387	Cutchen v. Coleman.....	264
Clarke v. Sewall.....	84	Cuthbert v. Peacock.....	83
Clarke v. Turton.....	439	Cutter v. Bonney.....	454
Clarke v. Waite.....	212	Cutter v. Powell.....	368
Clarke v. Wright.....	436		
Clason v. Bailey.....	289, 493	Dailey v. Green.....	132
Clason v. Merritt.....	287	Daniel v. Cartony.....	262, 263
Clawson v. Primrose.....	52	Darlington v. Pulleney.....	720
Cleverly v. Brett.....	715, 718	Dartmouth College v. Woodward 525	
Clinan v. Cooke ..380, 436, 564, 568		Dawes v. Boylston.....	133, 591
Closson v. Stearns.....	289	Dawson v. Chamney.....	453
Clowes v. Higginson.....	564	Dawson v. Collis.....	131, 132
		Davis v. Pierce.....	347
		Davis v. Bradley.....	136

	PAGE		PAGE
Davis v. Fuller.....	532	Dwel v. Boisblanc.....	51
Davis v. Getchell.....	532	Dusenbury v. Ellis.....	383
Davis v. Higford.....	472	D'Utrecht v. Melchior.....	615
Davis v. Mason.....	744		
Davis v. Thorne.....	334	Earle v. Rowercroft.....	177
Day v. Newman.....	521	Earle v. Wood.....	106
Day v. Raguet.....	126	Earl of Oxford's case.....	168
Day v. Trig.....	420	Eastern R. R. Co. v. Relief Ins.	
De Berdt v. Atkinson { 252, 255, 621		Company.....	145
	622, 694, 695	East India Co. v. Sandys.....	528
Decker v. Livingston.....	377	East v. Thornburg.....	567
Deering v. Torrington.....	481	Eaton v. Aspinwall.....	462
Deg v. Deg.....	665	Eaton v. Boston etc. R. R.....	534
Deihl v. King.....	632	Eaton v. White.....	371
Delafield v. State of Illinois.....	467	Edmondson v. Kite.....	397
Delager v. Hazard.....	492	Edson v. Munsell.....	194
Demarest v. Wynooop.....	714	Edwards v. Bodine.....	558
Denman v. Prince.....	503	Edwards v. Green.....	207
Dennis v. Rider.....	371	Edwards v. McLeay.....	555
Dennis v. Walker.....	445	Egleston v. Knickerbocker.....	503
De Peyster v. Clarkson.....	513	Elcox v. Hill.....	455, 457
Depeyster v. Haabrouk.....	569	Elder v. Elder.....	567
Devaux v. Detroit.....	558	Elliot v. Fitchburg R. R. Co.....	532, 533
Dexter v. Hall.....	234	Elliot v. Rogers.....	378
Dias v. Brunel.....	484	Emerson v. Brigham.....	127, 340, 741
Dickerman v. Day.....	263	Emmons v. Kiger.....	492
Dickerson v. Rogers.....	450	Equitable etc. Ins. Co. v. Paterson.....	43
Dickinson v. Gay.....	128, 130, 126	Erakine v. Townsend.....	171
Dickon v. Clifton.....	577	Esdaile v. Sowerby.....	621, 623
Dicks v. Street.....	715	Esselstyn v. Weeks.....	459
Digge's case.....	723	Evans v. Ashley.....	731
Dillaye v. Greenough.....	331	Evans v. Peacock.....	521
Dilling v. Murray.....	534	Evans v. Webb.....	548
Ditson v. Ditson.....	206, 207, 208	Evans v. Wells.....	503
Dodd v. Ellington.....	167	Evelyn v. Templar.....	359
Doe v. Ball.....	378	Everett v. Gray.....	216
Doe v. Brown.....	419	Eyre v. Countess of Shaftsbury.....	518
Doe v. Campbell.....	399		
Doe v. Lannington.....	450	Fairbanks v. Lamson.....	106
Doe v. Manning.....	358, 359	Farmers' Bank v. Kimmel.....	264
Doe v. Martyr.....	359	Farmington Academy v. Allen.....	56, 203
Doe v. Oxenden.....	419	Farnham v. Hotchkiss.....	558
Doe v. Phelps.....	399	Farwell v. Mather.....	381
Doe v. Rutledge.....	358, 361	Fancett v. Nichols.....	453
Doggett v. Emerson.....	513	Faxon v. Mansfield.....	368
Dorchester v. Effingham.....	547	Fell v. Lutwidge.....	516
Doremus v. Burton.....	351	Fellows v. Miner.....	106
Dormer v. Turnland.....	720	Fenly v. Stewart.....	493
Dornford v. Dornford.....	511	Fenn v. Harrison.....	68
Dorsey v. Dorsey.....	207	Fenner v. Mears.....	322
Doughty v. Doughty.....	207	Fenno v. Sayre.....	204
Douglass v. Spear.....	493	Fetrow v. Wiseman.....	234
Doyle v. Lord.....	53	Finch v. Rosbridget.....	527, 552
Doxon v. Haigh.....	310	Fish v. Sawyer.....	271
Draper v. Arnold.....	121	Fisher v. Evans.....	443
Druco v. Denison.....	417	Fitzhugh v. Love.....	685
Drury v. Natick.....	106	Fitzroy v. Gwillim.....	167
Dubois v. Campan.....	229	Fleming v. Brook.....	421
Dudding v. Hill.....	397	Fletcher v. Cole.....	394
Duffy v. Duncan.....	506	Fletcher v. Stone.....	172
Duke of Leeds v. Munday.....	414	Flood v. Finlay.....	564
Dunlap v. Hawkins.....	362	Foley v. Wyeth.....	65
Dunlap v. Gregory.....	743	Foliot v. Ogden.....	469
Dunton v. Brown.....	137		

	PAGE		PAGE
Forbes v. American Mutual etc. Ins. Co.	42	Gordon v. Secretan	310
Forbes v. Ross	476	Gorgerat v. McCarty	689
Ford v. Fothergill	395	Goshen Turnpike v. Hurtin	460
Fordyce v. Ford	489	Goulden v. Prince	116
Fordyce v. Willis	537	Gould v. Boston Duck Co.	532
Forster v. Hale	428	Gowland v. De Faria	521
Foster v. Cook	545, 547	Graham v. Dickinson	484
Foster v. Foster	510	Gratz v. Ewalt	614
Foster v. Julien	445	Graves v. Boston Marine Ins. Co.	144
Fountaine v. Pellet	476	Graves v. Graves	739
Foust v. Moorman	228	Gray v. Jackson	314
Fowle v. Freeman	486	Gray v. Physic	289
Fowler v. Dorton	455	Greatorex v. Cary	547
Fowler v. Fowler	83	Greenleaf v. Harris	534
Fox v. Carlyne	267	Greenough v. Emery	112
Fox v. Corey	397	Greene v. Clarke	314
Fox v. Fletcher	90	Green v. Covilland	492
Fraser v. Thompson	363	Green v. McDonald	558
Frasier v. Brown	534	Green v. Reynolds	303
Freeman v. Boynton	37	Gregory v. Salter	662, 664
Freeman v. Brittin	263	Gregson v. Riddle	486
Freemout v. Dedire	483	Griffith v. Beecher	484
French v. Davies	546	Griggs v. Dodge	632
Fridge v. State	137	Grinnell v. Cook	451, 452
Friend v. Gilbert	151	Griswold v. Johnson	271
Frink v. Green	503	Grossman v. Lauber	377
Frost v. Raymond	332, 334, 556, 614	Grumon v. Raymond	153, 734
Fry v. Porter	418	Guardian M. L. Ins. Co. v. Hogan	43
Frye v. Barker	371	Guerand v. Dandelest	746
Fuller v. Coats	455	Guest v. Hornfray	489
		Guice v. Sellers	558
		Gunn v. Scovil	397
Gallagher v. Waring	126	Gunther v. Atwell	126, 128, 132
Galvin v. Prentice	369	Gurney v. Atlantic, etc., R. R. Co.	126
Gamba v. Covenant, etc. Ins. Co.	43		
Garfoot v. Garfoot	518	Hadley v. Upshaw	455
Garniss v. Gardiner	513	Haggerty v. Palmer	394
Garside v. Trentand Mersey Navigation	312	Halcott v. Markant	665
Geddings v. Canfield	271	Hale v. Gerrish	234
Geddis v. Hawk	371	Hale v. Henrie	665
George v. Wood	490	Hale v. Ross	587
Gerber v. Grabel	51	Hall v. Conn. River Co.	237
German v. Gabbald	662, 663, 664, 665	Hall v. Gray	377
Gerrish v. Mace	172	Hall v. Noble	492
Gerrish v. New Market Co.	534	Hall v. Pike	451
Gibbs v. Swift	81	Hall v. Plassan	126
Gibson v. Patterson	488	Hall v. Ross	587
Gilchrist v. Stevenson	484	Halsted v. Brown	371
Giliham v. Madison County R. R.	534	Hamilton v. Buckwalter	548
Giles v. Fontleroy	455	Hamphire v. Pierce	417
Gillett v. Johnson	533	Handley v. Cunningham	250
Gillet v. Van Rensselaer	506, 513	Hanning v. Ferrers	439
Gillilan v. Ludington	371	Hanson v. Buse	126
Gill v. Brown	334	Harbert's case	498, 502
Gilman v. Gilman	513	Harbison v. McCartney	121
Gilmore v. Driscoll	64, 65, 66	Harding v. Allen	207
Gladman v. Henchman	472	Hardy v. Walters	234
Glassington v. Rawlins	243	Hargous v. Stone	126, 129
Glass v. Hulburt	442, 568	Harning v. Castor	168, 169
Glynn v. Nichols	527	Harrington v. Wheeler	489
Gogel v. Jacoby	629	Harris v. Bishop of Lincoln	417
Goode v. Webb	250	Harris v. Frink	397
Gookin v. New England, etc., Co.	187	Harris v. Ingleden	502
		Harrison v. Harrison	476

	PAGE		PAGE
Harrison v. Price.....	372	Hood v. N. Y. etc. R. R. Co....	274
Hart v. Stone.....	274	Horner v. Graves.....	744, 745
Harvey v. Harvey.....	625	Hostler v. Skull.....	706
Haskins v. Warren.....	131	Hotham v. Sutton.....	419
Harkinson's Appeal.....	747	Housatonic Bank v. Martin.....	172
Hasler v. Hasler.....	506	Houser v. Tulley.....	455
Hastings v. Dollarhide.....	234	How v. Weldon.....	520
Hatch v. Hatch.....	376	Howard v. Brown.....	371
Hathaway v. Ryan.....	397	Howard v. Harris.....	472
Hatch v. Vermont.....	534	Howe v. Russell.....	397
Hawkes v. Saunders.....	715, 717	Howe Machine Co. v. Pease.....	456
Hawkins v. Holmes.....	442	Howell v. Ashmore.....	714
Hawley v. Smith.....	455	Howell v. Jackson.....	456
Hawley v. Soper.....	228	Howland v. Edmonds.....	462
Hay v. Cohoes Co.....	65	Howth v. Franklin.....	450, 454
Hayes v. Caryll.....	488	Hoyt v. Holly.....	744
Hayes v. Waldron.....	532	Hubbard v. Davis.....	371
Hayes v. Ward.....	503	Hubbard v. Gurney.....	371
Haynes v. Mico.....	82	Hubbard v. Miller.....	744
Hayward v. Young.....	744	Huddleston v. Briscoe.....	486
Hazard v. Loring.....	129	Huetts v. Swift.....	454
Hearle v. Greenbank.....	518	Hulett v. Swift.....	453
Heilner v. Imbrie.....	714	Hull v. Hull.....	207
Henok v. Shaner.....	629	Humble v. Glover.....	282
Hendricks v. Gillespie.....	687	Hume v. Arrasmith.....	737
Henkle v. Royal Ex. Ins. Co.....	563, 564	Humphreys v. Humphreys.....	516
Henriques v. Dutch West India Co.....	461	Hunnewell v. Taylor.....	229
Henry v. Grady.....	492	Hunt's case.....	465
Henry v. James.....	36	Hunter v. Bradford.....	558
Henry v. Jones.....	85, 86, 250	Hurst v. Kirkbride.....	625
Herrick v. Borst.....	870	Huah v. Trustees of Morton Col. lege.....	552
Herring v. Wickham.....	362	Hyatt v. Boyle.....	129
Heylyn v. Adamson.....	261	Hyatt v. Taylor.....	458
Hickman v. Thomas.....	452	Hyatt v. Twomey.....	558
Hiern v. Mill.....	556	Iddings v. Iddings.....	626
Higgins v. Wright.....	484	Ingallsbee v. Wood.....	451
Higginson v. Clowes.....	564	Ingalls v. Morgan.....	503
Higginson v. Nahant.....	151	Ingalls v. Stockman.....	499
High v. Butte.....	712	Insurance Co. v. Chase.....	145
Hill v. Butler.....	558	Irby v. Wilson.....	207
Hill v. Gibbs.....	377	Irnham v. Child.....	501, 563
Hills v. Payson.....	93	Isaacs v. N. Y. Plaster Works..	309
Hills v. University of Oxford...	523	Israel v. Douglass.....	322
Hine v. Dodd.....	317	Ives v. Hazard.....	493
Hinman v. Leavenworth.....	270	Jackson v. Bull.....	408
Hitchcock v. Coker.....	745, 746	Jackson v. Catlin.....	97
Hitchin v. Hitchin.....	643	Jackson v. Churchill.....	548
Hodges v. Howard.....	381	Jackson v. Given.....	317
Hodges v. Raymond.....	161	Jackson v. Lawton.....	282
Hodgson v. Dexter.....	338, 337, 417	Jackson v. Phillips.....	106
Hodgson v. Hodgson.....	207, 208	Jackson v. Plumber.....	461
Hoffman v. Hoffman.....	142	Jackson v. Richards.....	253, 255, 621
Hogg v. Dorrah.....	130	Jackson v. Sill.....	439
Hogins v. Plympton.....	743	Jackson v. Stanley... { 282, 283, 286, 401, 402	
Holbrook v. Waters.....	743	Jackson v. Wass.....	306
Holder v. Soulby.....	450	Jalie v. Cardinal.....	451, 456
Holland v. Turner.....	256	Janet v. Jenkins.....	50, 52
Hollowell v. Simonson.....	548	Jarvis v. Hatheway.....	737
Holmes v. Evans.....	381	Jeffery v. Walton.....	289
Holmes v. Holmes.....	525, 631	Jenkins v. Clark.....	371
Holmes v. Martin.....	743		
Holt v. Payne.....	558		
Homes v. Dana.....	202		

	PAGE		PAGE
Jenkins v. Einstein	525	Laye v. Hayes	261
Johnson v. Buck	290	Lear v. Friedlander	330
Johnson v. Child	439	Leather Cloth Co. v. Lonsont ...	744
Johnson v. Jordan	532	Leavenworth v. Delafield ...	647, 649
Johnson v. Reynolds	451	Leavitt v. Savage	371
Johnson v. Richardson	454	Le Breton v. Nouchet	209
Jones's Appeal	364	Le Chevalier v. Lynch	133
Jones v. Berkley	298	Lee v. Evans	503
Jones v. Collier	544	Lee v. Kirby	525
Jones v. Fales	36, 253	Lefevre v. Lefevre	106
Jones v. Stanton	558	Le Grange v. Hamilton	472
Jones v. Statham	564	Leighton v. Wales	748
Joy v. Allen	182	Lemon v. Lemon	543
Judd v. Bushnell	268	Leonard v. Leonard	194
Justice v. Lang	287, 290	Lerow v. Wilmarth	642
Kachlein v. Balston	628	Lester v. Garland	250
Kachlin v. Mulhallon	627, 628	Lestrade v. Barth	569
Kase v. Johns	131	Levett's case	363
Kostenbader v. Peters	626	Lewis v. Phoenix, etc., Co.	43
Keane v. Boycott	136	Lincoln Bank v. Page	26
Keats v. Hugo	49	Lindenmuller v. The People	251
Kee'ler v. Field	394	Linningdale v. Livingston	368
Keip v. Goodrich	306	Littledale v. Dixon	343
Kellogg v. Larkin	744	Livingstone, <i>in re</i>	558
Kelsey v. Berry	455	Livingston v. Delafield	343
Kemp v. Humphreys	492	Livingston v. Maryland Ins. Co. .	344
Kendall v. Inhabitants of Kings- ton	222	Lippincott v. Whitman	626
Kendall v. Lawrence	136, 234	Lloyd v. Collett	486
Kennedy v. Kennedy	298	Lloyd v. Holly	268
Kerr v. Kerr	207, 208	Locke v. N. A. Ins. Co.	144
Kiddell v. Ford	623	Lodge v. Phelps	468
Kilgour v. Miles	251	Long v. Colburn	67, 71
Kingsbury v. Gould	106	Loomis v. Eagle, etc., Ins. Co. .	42
King v. Baldwin	370, 371	Loomis v. Easton	264
King v. Talbot	506	Lord v. Lord	548
Kinney v. Commonwealth	200	Lord Burkhurst v. Fenner	612
Kip v. Bank of N. Y.	481	Lord Cheyney's case	401
Kirk v. Webb	665	Lord Coningsby's case	245
Kiston v. Hildebrand	450, 454	Lord Ossulston v. Lord Yarmouth	473
Knights v. Putnam	264	Lord Walpole v. Lord Cholmon- dely	417
Kuntz v. Temple	251	Loweree v. Newark	534
Kyle v. Kavanagh	387	Lowry v. Hurd	558
Ladue v. Seymour	369	Lowry v. Mehaffy	290, 493
Lake v. Phillips	501	Lusk v. Belote	451
Lamb v. Starr	228	Luttrell's case	527
Lambert v. Pack	261	Lyford v. Putnam	397
Lampman v. Milks	50	Lyon v. Bertram	131
Lane v. Jackson	120	Lyon v. Lyon	206, 207
Lanfair v. Sumner	35	Lyon v. Smith	450
Langley v. Brown	563	Lyons v. Hill	251
Lansing v. Lansing	513	Macbeath v. Haldiman	336, 337
Lantry v. Parks	302	Macclesfield v. Fitton	472
Largis's case	656	Macdowall v. Fraser	342
Larrabee v. Van Alstyne	543	Magee v. Billingsley	126, 127, 132
Laugherty v. McLean	558	Magniac v. Thompson	363
Lawrence v. Fairhaven	194	Maguire v. Maguire	207
Lawrence v. Howard	451, 455	Mahurin v. Harding	374
Lawrence v. Kidder	744	Mahurin v. Pearson	371
Lawrence v. Lawrence	542, 543, 544	Maigley v. Hauer	491
Lawrence v. McArter	234	Mallan v. May	744, 745
Lawrenson v. Butler	486, 494	Manchester Mfg. Co. v. Sweeting	370
		Maney v. Porter	558

	PAGE		PAGE
Manning v. Manning.....	506	Milne v. Moreton.....	591
Manning v. Wells.....451,	454	Milward v. Thanet.....	499
Mann v. Eekford.....	525	Miner v. Gilmour.....	534
Margraf v. Muir.....	525	Minot v. West Roxbury.....	151
Marine Ins. Co. v. Jauncey.....	484	Mirick v. French.....	203
Markham v. Brown.....	328	Mitchell v. Hazen.....	271
Markham v. Jaudon.....	296	Mitchell v. Mayor of Rome.....	64
Marks v. Pell.....	566	Mitchell v. McMullen.....	558
Marlow v. Smith.....	413	Mitchell v. McMillan.....	591
Marquess v. Caldwell.....	493	Mitchell v. Reynolds.....	742
Marquis of Townsend v. Stan- groom.....	502	Mitchell v. Tarbutt.....	470
Marshall v. Crehore.....	228	Mitchell v. Union Life Ins. Co..	42
Marshall v. Union Ins. Co.....	343	McMillian v. Birch.....142,	143
McArtee v. Engart.....	525	Moale v. Buchanan.....	569
Martin v. Bearens.....	626	Mody v. Gregson.....129,	131
Martin v. Houghton.....	328	Mondell v. Steel.....	132
Martin v. Skehan.....	371	Monroe Sav. Bank v. Rochester.	377
Maryland Ins. Co. v. Rudans....	344	Montpelier Bank v. Dixon.....	371
Mary Portington's case.....	267	Moore v. Browne.....	527
Mason v. Hill.....	532	Moore v. Graves.....	121
Mason v. Thompson.....451,	454	Moore v. Moore.....	421
Mateer v. Brown.....	453	More v. Bonnet.....	744
Matter of Real.....	366	Moreland v. State Bank.....	371
Mattoon v. Barnes.....	46	Morell v. Burns.....	302
Maure v. Harrison.....482,	537	Morey v. Herriek.....	665
Maynard's case.....555, 556,	612	Morgan, <i>ex parte</i>	411
Mayor of Kingston v. Horner...	273	Morgan v. Hinman.....	499
Mayor v. Appold.....	532	Morgan v. Palmer.....	558
May v. Slade.....	377	Morgan v. Seymour.....	497
McBarnie's Trustees, <i>ex parte</i> ...	363	Morret v. Paske.....	476
McCauley v. Weller.....	534	Morrison v. Marquardt.....	51
McCloak v. Miller.....	397	Morrison v. Springer.....	223
McClurg's appeal.....	744	Morris v. Bank of England.....	483
McCrea v. Purmort.....	493	Morris v. Lee.....	261
McDaniels v. Robinson.....451,	454	Morris v. Rexford.....	394
McDonough v. Templeman.....	704	Morse v. Slue.....	699
McGhee v. Jones.....	558	Morse Twist Co. v. Morse.....	744
McKally's case.....	303	Mortlock v. Buller.....	520
McKernon v. James.....	438	Morton v. Lamb.....	306
McLaughlin v. Swann.....	324	Moses v. Macferlan.....	615
McMenomy v. Ferrers.....	323	Moses v. Mead.....	127
McNair v. Schwarz.....	397	Moss v. Byrom.....177,	179
McDonald v. Edgerton.....451,	454	Moysten v. Fabrigas.....	446
Meads v. Lansingh.....	503	Mullen v. Stricker.....	51
Means v. Wells.....	228	Mundine v. Pitts.....	714
Medino v. Stoughton.....	616	Munn v. Wilsmore.....	352
Medway v. Needham.....	209	Munroe v. Luke.....	228
Meer's case.....	473	Murgatroyd v. Crawford.....	343
Meres v. Ansell.....	501	Murray v. Williamson.....	628
Merriman v. Chapman.....	132	Musgrove v. Gibbs.....	261
Merritt v. Glaghorn.....453,	454	Myers v. Cottrill.....454,	455
Metcalf v. Hess.....	454	Myers v. Vanderbelt.....	289
Metropolitan Bank v. Van Dyck.	223		
Meyer v. Everth.....	130	Nairne v. Prowse.....	363
Meymot, <i>ex parte</i>	273	Napier v. Bulwinkle.....	64
McGuire v. Grant.....	65	Neil v. Wilcox.....	451
Millar v. Hall.....	111	Neilson v. Blight.....323,	482
Miller v. Dennett.....	228	Nevin v. Belknap.....	439
Miller v. Henderson.....	626	Newall v. Wright.....	94
Miller v. Stevens.....	130	New Bedford Sav. Inst. v. Fair- haven Bank.....	484
Millard v. Thorn.....	330	Newcomb v. Griswold.....	366
Mill R. Mfg. Co. v. Smith.....	536	New Ipswich Factory v. Batchel- der.....	50
Mills v. Eden.....	496		

	PAGE		PAGE
Newmarck v. Clay.....	339	Parke v. Chadwick.....	626
Newstead v. Seearles.....	352	Parkhurst v. Van Cortlandt..	493, 494
Newton v. Bennett.....	509	Parkinson v. Lee.....	124
Newton v. Fay.....	76	Parkman v. Welch.....	503
Nichols v. Frearson.....	263	Parmelee v. Cameron.....	525
Nichols v. Godts.....	121	Parteriche v. Powlet.....	501
Nichols v. Judson.....	84	Partridge v. Davis.....	289
Nichols v. McDowell.....	371	Passal v. Goodsall.....	310
Nichols v. Nichols.....	229	Patch v. Wheatland.....	35
Nichols v. Squire.....	106	Pate v. Joe.....	731
Nicholson v. Gouthit.....	621, 622, 695	Pateshall v. Apthorp.....	330
Nightingale v. Chafee.....	330	Patrick v. Faulke.....	251
Nightingale v. Withington.....	136	Patten v. Pantou.....	516
Nixon v. Hyserott.....	332	Pattison v. Hull.....	484, 503
N. J. Steam Nav. Co. v. Mer-		Patton v. Taylor.....	558
chants' Bank.....	314	Payne v. Eden.....	326
Nobles v. Bates.....	744	Peabody v. Minat.....	81
Norcross v. Norcross.....	451, 454	Peacock v. Monk.....	491
Norris v. Le Neve.....	476	Pearpoint v. Graham.....	250
North v. Cox.....	483	Pearsall v. Dwight.....	108
Nuttall v. Bracewell.....	534	Pearson v. Henry.....	718
		Peay v. Wright.....	558
Oakley v. Farrington.....	142	Peck v. Burr.....	302
O'Brien v. Elliott.....	548	Peck v. New London Ins. Co....	274
O'Connor v. Forster.....	448	Pemberton v. Hawkins.....	127
O'Connor v. Towns.....	250	Pendleton v. Grant.....	417
Odell v. Odell.....	106	Penniman v. Hartshorn.....	493
Odiorne v. Colley.....	121	People v. Albertson.....	223
Oden v. Saunders.....	592	People v. Boring.....	731
O'Hanlon v. Myers.....	143	People v. Call.....	465
Old Colony R. R. v. Evans.....	290, 493	People v. Gray.....	366
Oldham v. Scrivener.....	121	People v. Jansen.....	370
Oliver v. Gray.....	680	People v. Keyser.....	377
Oliver v. Greene.....	143	Perkins v. Hays.....	714
Oliver v. Houdlet.....	234	Perkins v. Lyman.....	745
Oliver v. Pitnam.....	194	Pernam v. Wead.....	192
Olley v. Manning.....	353	Peter v. Beverly.....	525
Olmstead v. Loomis.....	534	Phillipi v. Gove.....	126
Oneida Mfg. Soc. v. Lawrence..	126	Phillips Academy v. Davis.....	56, 202
O'Neil v. Harkins.....	66	Phy v. Royal Exchange Co....	178, 181
Ongley v. Peale.....	104	Piatt v. Oliver.....	506, 513
Onslow v. Horne.....	140	Picketon v. Litecote.....	556
Oppenheim v. White Lion Hotel		Pierce v. Cate.....	38
Company.....	455	Pierce v. Fauconberg.....	578
Oregon Iron Co. v. Trullinger..	534	Pierce v. Fuller.....	745
Ormrod v. Huth.....	128	Pierce v. Robinson.....	484
Osborn v. Phelps.....	568	Pierson v. Hooker.....	377
Ossulston v. Yarmouth.....	473	Pigott v. Surry.....	61
Otto v. Alderson.....	126	Pilkington v. Scott.....	746
Owen v. Long.....	234	Pincke v. Curtis.....	488
Owings v. Mason.....	714	Pinkerton v. Woodward.....	450, 451, 454
		Pintard v. Davis.....	371
Packard v. Northcraft.....	454	Pitcairn v. Ogbourne.....	566
Packer v. Button.....	387	Pitts v. Lancaster.....	532
Page v. Webster.....	371	Pitts v. Snowden.....	543, 544
Paine v. Meller.....	490	Plunket v. Fenson.....	483
Palmer v. Fletcher.....	49, 52	Pocock v. Reddington.....	510
Palmer v. Jones.....	523	Pons v. Kelly.....	255
Palmer v. Stebbins.....	745	Pordage v. Cole.....	300
Parish v. Gray.....	371	Porter v. Hill.....	79, 88, 271
Parker v. Foote.....	51	Portington's case.....	267
Parker v. Griswold.....	534	Portland Bank v. Stubbs.....	34, 35
Parker v. Langley.....	606	Portmore v. Morris.....	501
Parker v. M'Iver.....	684	Potter v. Brown.....	110

	PAGE		PAGE
Potter v. Hubbill.....	472	Ricks v. Dillahunty.....	126
Powell's case.....	84	Rickets v. Livingston.....	85
Powell v. Mumford Mfg. Co. ...	503	Ridgeley v. Crandall.....	137
Powell v. Sims.....	51	Rising v. Standard.....	81
Powers v. Lynch.....	108	Roberts v. Turner.....	313
Pratt v. Adams.....	484	Roberts v. Woolbright.....	558
Pratt v. Parkman.....	35	Robeson v. Pittenger.....	51
Pratt v. Willey.....	262, 263	Robinson v. Ensign.....	121, 122
Prentiss v. Savage.....	119	Roehner v. Knickerbocker Life	
Preston v. Mercereau.....	501	Ins. Co.....	250
Price v. Lewis.....	628	Rocke v. Hart.....	505
Prickman v. Trip.....	527	Roe v. Reade.....	412
Priddle's case.....	365	Rogers v. Earl.....	565
Proctor v. Moore.....	112	Rogers v. Libbey.....	397
Prosser v. Warner.....	206	Rogers v. Sawin.....	49
Pugh v. Leeds.....	248	Rolwell v. Vaughan.....	616
Pugh v. Wheeler.....	532	Root v. G. W. Railway Co.....	314
Pullman Car Co. v. Smith.....	450	Rose v. Bartlett.....	420
Pullman v. Corning.....	369	Rosewell v. Pryer.....	49, 52
Pumpelly v. Green Bay Co.....	534	Ross v. Ewen.....	720
Pumpelly v. Phelps.....	383	Ross v. Hunter.....	179
Purvis v. Coleman.....	455, 457	Ruggles v. Keeler.....	469
Putman v. Sullivan.....	38	Rundle v. Allison.....	506
Pyle v. Cravens.....	234	Russell v. Annable.....	46
Queen v. Curl.....	634, 635	Russell v. Dudley.....	172
Rafael v. Verelst.....	446	Russell v. Kenney.....	503
Ram v. Hughes.....	717	Russell v. Minor.....	394
Ramalye v. Leland.....	457	Ryan v. Dunlap.....	330
Rambottom v. Gordon.....	564	Ryder v. Hathaway.....	394
Randal v. Randal.....	565	Ryder v. Union India Rubber Co.	397
Randall v. Rhodes.....	130	Safford v. Vail.....	264
Randall v. Sanderson.....	51	Sagitary v. Hyde.....	496
Ranselaugh v. Thornhill.....	472	Salem Bank v. Gloucester Bank.	198
Rangely v. Spring.....	229	Salisbury v. Stainer.....	129
Rankin's case.....	465	Salter v. Burt.....	250
Ransom v. Hays.....	264	Sampson v. Hoddinott.....	534
Raphael v. Boehm.....	510	Sampson v. Vaughan.....	565
Ratcliffe v. Graves.....	509	Sanders v. Ochiltree.....	251
Rawson v. Johnson.....	308	Sandford v. Dillaway.....	37, 254, 255
Ray v. Sweeney.....	50, 52	Sands v. Lyons.....	251
Raymond v. Bernard.....	368	Sands v. Taylor.....	126
Reab v. Moor.....	302	Sans v. Tripp.....	493
Read v. Amidon.....	451, 454	Sascer v. Young.....	371
Rearick v. Swinehart.....	626	Sasseen v. Clark.....	454
Reech v. Kennegal.....	716	Saunderson v. Jackson.....	287
Reed v. Batchelder.....	234	Saunderson v. Judge.....	444
Regina v. Bailey.....	465	Savil v. Roberts.....	605, 609
Regina v. Rymer.....	456	Schermerhorn v. Vanderheyden.	503
Regina v. Thurborn.....	465	Schieffelin v. N. Y. Ins. Co.....	293
Reid v. Cox.....	371	Schiffer v. Pruden.....	366
Remnants in Court.....	484	Schmidt v. United Ins. Co.....	54
Remson v. Beekman.....	370	Schnitzer v. Oriental Print Works	130
Renshaw v. Gans.....	626	Schroeder v. Gemeinder.....	493
Reserve, etc., Ins. Co. v. Kane..	44	Schuhardt v. Alens.....	131
Rex v. Adderley.....	243	Seagood v. Meale.....	380
Rex v. Ivens.....	456	Seaman v. Duryea.....	513
Rex v. Leach.....	465	Sedam v. Williams.....	484
Rich v. Jackson.....	502	Seixas v. Woods.....	127, 614, 615
Rich v. Topping.....	263	Selleck v. French.....	474, 748
Richardson v. Greese.....	84	Semple v. Morrison.....	234
Richardson v. Maine, etc., Ins..	54	Sergeant Maynard's case.....	555, 556, 612
Richardson v. Vt. Cent. R. R. Co.	65	Sergison <i>Ex parte</i>	413
		Seton v. Slade.....	393, 470

	PAGE		PAGE
Sewall v. Sewall	206	Stein v. Hanok	51
Seymour v. Cook	455	Stemhouser v. Wilman	617
Seymour v. Delaney	525	Stephens v. Lawson	328
Seymour v. Harvey	268	Sterry v. Arden	363
Shamleffer v. Council Grove Co.	532	Stevenson v. Gray	209
Shand v. Aberdeen Canal Co.	553	Stevens v. Cooper	499
Shannon v. Bradstreet	434	Stevens v. Warren	42
Shaw v. Berry	454	Stewart v. Eden	443, 444
Sheehy v. Mandeville	329	Stewart v. Kennet	200
Sheets v. Selden	250	Stewart v. Parsons	457, 458
Sheffield v. Watson	334, 336, 337	Stewart v. Supervisors	223
Shelburn v. Inchiquin	563	Stoops v. Smith	130
Sheldon v. Congregational Parish ..	142	Strader v. Graham	207
Shirely v. Wilkinson	342	Strahan v. Sutter	545
Shirly v. Shirly	493	Street v. Blay	131, 132
Shoecroft v. Bailey	455	Strade v. Russell	414
Sibley v. Ellis	194	Strong v. Tompkins	202
Silloway v. Brown	81	Strother v. Cathey	286
Simon v. Miller	454	Strout v. Bradbury	121
Simpson v. Robertson	395	Stubbs v. Lund	684
Simpson v. Vaughan	563	Sturges v. Buckley	251
Sims v. Gurney	651	Sturges v. Crowninshield	591
Sir Charles Cox's creditors	483	Stuyvesant v. Hone	503
Sir Thomas Meer's case	473	Sutton v. Mandeville	397
Sir W. Harbert's case	498, 502	Sweetapple v. Bindon	506
Slater v. Smith	290	Swezey v. Thayer	484
Slee v. Manhattan Co	484	Switzer v. Garber	627
Slingsby v. Barnard	59, 60	Swett v. Cutts	534
Small v. Herkimer Mfg. Co	462	Swindon Water Works v. Wilts' Nav. Co	533
Smith v. Allen	364	Symondson v. Tweed	380
Smith v. Barnam	490		
Smith v. Brady	302, 369	Tallmadge v. Brush	370
Smith v. Brown	111, 492	Tavis v. Bury	350
Smith v. Buchanan	110	Tawney v. Crowther	380
Smith v. Carrington	344	Taylor v. Baldwin	503
Smith v. Gates	632	Taylor v. Benham	513, 525
Smith v. Lyons	394	Taylor v. Blanchard	744
Smith v. Pemberton	472	Taylor v. Jacoby	250
Smith v. Sheppard	699	Taylor v. Phillips	304
Smith v. Smith	111, 119, 206	Taylor v. Radd	563
Smith v. Spinola	111	Taylor v. Snyder	445
Smith v. Stewart	379	Taylor v. Welch	534
Smith v. Wiley	377	Taylor v. Williams	609
Snell v. Rich	699	Teall v. Felton	469
Snow v. Parsons	532	Teal v. Sears	313
Sohier v. St. Paul's Church	106	Terwinian v. Howell	715, 716
Sohier v. Williams	525	Thatcher v. Gammon	169
Soles v. Hickman	381	Thayer v. Felt	251
South Sea Co. v. D'Oliffe	565	The King v. Cator	105
Southwood v. Myers	450	The King v. Curl	634, 635
Spencer v. Champion	250	The King v. Davis	105
Springfield v. Harris	532	The King v. Delaval	634
Spurrier v. Hancock	489	The King v. Dingley	634
Stackpole v. Arnold	164	The King v. Edwards	365
Stanford Bank v. Ferris	274	The King v. Inhabitants of Castell Careinion	366
Stansell v. Jollard	62	The King v. Inhab. of Middlesex ..	310
Stanton v. Blossom	201	The King v. Wilkes	635
Staples v. Franklin Bank	38	Thelussan v. Woodford	104
Stapleton v. King	377	The Monte Alegre	131
Stark v. Parker	302, 369	The Sarah Jane	389
State v. Armington	208	The Star of Hope	651
State v. Cummings	223	The Triton	390
State v. Kennedy	208, 209		
Steam Nav. Co. v. Weed	462		

	PAGE		PAGE
Thickstun v. Howard.....	454	Vernon v. Vernon.....	548
Thomas v. Thomas.....	101	Vick v. Percy.....	558
Thompson v. Jones.....	310	Villars v. Palmer.....	371
Thompson v. Ketcham.....	443	Villaval v. Galway.....	544
Thompson v. Lay.....	234	Vischer v. Vischer.....	207
Thompson v. Lacy.....	450		
Thompson v. Marsh.....	121	Waddington v. Oliver.....	300, 301
Thompson v. White.....	626	Wadsworth v. Tillotson.....	533
Thornton v. Wynne.....	131	Wagenblast v. Washburn.....	569
Thorp, <i>In re</i>	506, 513	Wake v. Wake.....	541, 545
Tiegan v. Jackson.....	324	Walker v. Foxcroft.....	121
Tillotson v. Smith.....	532, 534	Walker v. Wilson.....	558
Tilton v. Tilton.....	569	Walling v. Potter.....	450
Timmins v. Shannon.....	558	Walpole v. Cholmondeley.....	417
Tippets v. Walker.....	382	Walsh v. Farrand.....	119
Tipson v. Fetner.....	387	Walsh v. Porterfield.....	456
Tipton v. Feitner.....	302, 369	Ward v. N. Y. Cent. R. R. Co..	448
Tobey v. Webster.....	329	Warfield v. Booth.....	746
Tolen v. Tolen.....	207	Waring v. Cunliffe.....	473
Tompkins v. Powell.....	714	Waring v. Mason.....	{ 126, 129, 130, 131, 132
Tooker's case.....	80	Warner v. Beardaley.....	370
Torrey v. Baxter.....	330	Warner v. Daniels.....	525
Townsend v. Stangroom.....	{ 502, 563, 564, 565	Wasburn v. Merrills.....	566
Townsend v. Windham.....	360	Washington Ins. Co. v. White..	187
Towns v. Riddle.....	371	Waterhouse v. Skinner.....	308
Tracy v. Albany Exchange Co..	381	Watson v. Bourne.....	113, 591
Trecothick v. Austin.....	484	Watson v. Hoy.....	687
Trent Nav. Co. v. Harley.....	370	Watson v. Todd.....	120
Treves v. Townshend.....	505, 510	Watts v. Bullas.....	564
Trimble v. Thorne.....	370	Waydell v. Luer.....	330
Trinimer v. Rayne.....	496	Webb v. Fairmanner.....	250
Troy Turnpike Co. v. M'Chesney	462	Webb v. Rice.....	503
Trueblood v. Trueblood.....	234	Weber v. Marshall.....	492
Trueman v. Fenton.....	639, 640	Webster v. Hodgkins.....	374
True v. Huntoon.....	377	Weeks v. Hull.....	250
Tucker Mfg. Co. v. Fairbanks...	71	Welby v. Rutland.....	537
Tucker v. Moreland.....	137, 234	Welland Canal Co v. Hathway..	462
Tunno v. Trezevant.....	363	Wellock v. Hammond.....	267
Tyndall v. Brown.....	200	Wells v. Mann.....	370
		Westerman v. Means.....	492
Underwood v. Hitchcock.....	380	Weston v. Alden.....	161
Union Mining Co. v. Ferris.....	534	Weston v. Barker.....	324
Union Turnpike Co. v. Jenkins..	460	West River Bank v. Gorham....	121
United States v. Appleton.....	50, 52	West v. Emmons.....	308
United States v. Sturges.....	484	West v. Cutting.....	131
Upton v. Vail.....	373, 374	Wetherby v. Mann.....	329
Urich v. Litchfield.....	417	Wetherston v. Edington.....	310
Urmston v. Pate.....	556	Wheatley v. Baugh.....	534
Utica Ins. Co. v. Lynch.....	513	Wheatley v. Chrisman.....	533
		Wheaton v. East.....	137
Vail v. Strong.....	374	Wheeler v. Bacon.....	121
Vallejo v. Wheeler.....	179	Wheeler v. Curtis.....	377
Van Arsdale v. Van Arsdale.....	548	Wheeler v. Field.....	445
Vance v. Throckmorton.....	454	Wheelwright v. DePeyster.....	503
Vanderhoest v. MacTaggart.....	126	Wheelwright v. Wheelwright...	376
Van Eps v. Schenectady.....	385	White v. Jones.....	286
Van Lew v. Parr.....	558	White v. Madison.....	383
Van Raugh v. Van Arsdaln.....	111	White v. Parker.....	506, 513
Vansickle v. Haines.....	531	Whiting v. Sullivan.....	368
Vassault v. Edwards.....	290	Whitney v. Slayton.....	744
Vasse v. Smith.....	137, 234	Whittaker v. Huesake.....	128
Veazie v. Williams.....	569	Whittingham's case.....	136
Vernon v. Stephens.....	488	Whittlesey v. McMahon.....	240

CASES CITED.

21

	PAGE		PAGE
Wiffin v. Roberts	253	Woodward v. Morse	454
Wigglesworth v. Dallison.....	131	Woolam v. Hearn	442, 564, 568
Wilcox v. Union Ins. Co.....	182	Worcester Medical Inst. v. Hard-	
Wilkie v. Roosevelt.....	264	ing.....	462
Wilkins v. Earle.....	454, 457	Wright v. Austin.....	484
Willis v. Glove.....	343	Wright v. Page.....	375
Williams v. Dickerson.....	632	Wright v. Ryder.....	743, 744
Williams v. Lawler.....	713	Wright v. Stockton.....	371
Williams v. Morland.....	532	Wright v. Taylor.....	503
Williams v. Otes.....	208	Wright v. Weeks.....	381
Williams v. Spafford.....	126	W. Trans. Co. v. Lansing.....	381
Willard v. Reinhard.....	450	Wycoff v. Longhead.....	261
Willings v. Consequa.....	120, 131		
Wilson v. Getty.....	654	Yates v. Lansing.....	576, 732
Wilson v. People.....	465	Yeates v. Pryor.....	558
Winn v. Littleton.....	412	York v. Grindstone.....	451
Winalow v. Austin.....	730	Yoss v. De Freudenrich.....	492
Wintermute v. Clark.....	450	Young v. Miller.....	375
Wisheart v. Legro.....	377	Younger v. Welch.....	492
Wolfe v. Howes.....	302		
Woodbury v. Woodbury.....	397	Zachary v. Lester.....	705
Woodmansie v. Logan.....	606	Zebach v. Smith.....	525
Woodruff v. Bunce.....	558	Zollman v. Moore.....	714
Wood v. Dummer.....	484	Zouch v. Parsons.....	125, 221
Wood v. New England etc. Co..	187		

AMERICAN DECISIONS
VOL. VII.

Blake, for the plaintiff.

Whiting, *pro se*.

By Court, PARKER, C. J. We cannot suppose that the trifling error in the description of the note, on which the defendant was indorser, can discharge him from his liability. It was properly left to the jury to decide, whether he must not have known that the notice referred to the only note which it seems lay in the bank, on which he was liable as promisor or indorser; and the jury have determined that he must have had such knowledge. The note being made payable at the bank, must be considered as having reference to the rules and practices there prevailing, so that the form of the notice was sufficient.

As to the other objection, that although the notice was left with the defendant on the proper day, yet that it stated the note to be due before the days of grace had expired; we consider this as an immaterial error, as the notice was in fact given on the right day; and it could not have prejudiced the defendant to be told, as he was, that a note, which was due three days before, was still unpaid.

Judgment according to the verdict.

As to the usages of banks forming part of the contracts entered into by persons dealing with them, see *Lincoln Bank v. Page*, 6 Am. Dec. 52.

HILLS v. ELIOT.

[12 Mass. 26.]

ASSIGNMENT OF MORTGAGE.—By an assignment of a mortgage, either by an indorsement on the back thereof or by a separate instrument referring to such mortgage, the assignee is put in the place of the mortgagee to all intents and purposes, unless a different intention is apparent from the contract.

TRUST ESTATE ESTABLISHED BY PAROL.—The principle that a trust estate cannot legally exist without a declaration in writing, signed by the party who holds the legal estate, does not apply to secret trusts and confidences, created for the purpose of defeating or delaying creditors, which may always be proved by parol.

TRUST IN ASSIGNED MORTGAGE.—Where a mortgagee assigned her interest in the mortgaged premises, and promised orally to repay the money and interest, unless the assignee should receive the money from the mortgaged premises, she was held liable as the trustee of the assignee, to the amount of the money so promised.

USURY IN PRIOR CONVEYANCE.—In real actions, under the general issue of *nil discessit*, a subsequent purchaser may give evidence of usury to avoid a prior conveyance from his grantor.

Action to recover the moiety of certain tenements, which demandant claims as having been mortgaged by one Edmund Haynes, and as having come to his hands by sundry mesne assignments. The demandant derived title as follows: In June, 1802, Haynes mortgaged the whole of the tenement to Catherine and Margaret Williams to secure the payment to them respectively of notes for five hundred dollars and one thousand dollars, one year from date. In 1804, Catherine assigned to John Williams her interest in the premises, the deed expressing a consideration of five hundred dollars, and conditioned that the assignment should be void upon the repayment of the five hundred dollars, with lawful interest, in two years. Catherine indorsed the note given to her by Haynes, directing the same to be paid to John Williams, not expressing the indorsement to be for value received. This note was not negotiable in form. The demandant then produced a deed purporting to convey to him absolutely all of John Williams' interest, the deed bearing date February 5, 1806. This deed was acknowledged April 19, following, and recorded June 17, 1807. Testimony was offered to show that the assignment from Catherine to John Williams was made to secure the repayment of the sum loaned to her, with a usurious interest of twelve per cent. per annum, which she orally promised to pay, unless he should receive the money from the mortgage. Evidence was also given to prove that the conveyance to demandant by Williams was not *bona fide*, but made to defeat an attachment levied upon property in Catherine's hands as trustee of John, in favor of one Tuckerman.

The tenant derived title as follows: After showing title in himself, by mesne conveyances, of Margaret's interest, he produced the record of a judgment recovered by one Tuckerman against John Williams and Catherine, sued as John's trustee, in November, 1806, the original writ having been served on Catharine in March, 1806; and gave in evidence a release to the tenant of all Catherine's right in the premises, dated January 23, 1811, upon the agreement that he, the tenant, should pay the sum due on the mortgage to the demandant or the attaching creditor, whichever should have the legal right thereto. There was also in evidence a release dated January

28, 1811, from Tuckerman to Catherine, of the judgment in his favor.

Verdict for the tenant pursuant to instructions subject to the opinion of the court.

Aylwin, for the demandant.

W. Sullivan, *contra*

By Court, PARKER, C. J. It is obvious from a consideration of the facts reported by the judge that the title of the demandant is well maintained by evidence, and that it is, therefore, necessary for the tenant to impeach the title successfully, in order that he may retain his possession of the premises demanded. There are three grounds upon which the tenant has attempted to defeat the title of the demandant:

First. He says that no interest or title in the land passed from Catherine to John Williams, the assignment being only of the mortgage deed and the notes of Haynes accompanying it, and not of the estate. But this objection was not much relied on, nor ought it to be, for the language of the deed of assignment sufficiently shows the intention of Catherine Williams to assign her interest in the land as well as the deed. And we can have no doubt that generally when a mortgagee makes a deed of assignment upon the back of the mortgage deed, or by a separate instrument referring to it, the assignee is put in the place of the mortgagee, to all intents and purposes; unless a different intention is apparent from their contract.

The next objection to the title of the demandant is founded on the usurious contract between Catharine and John Williams, which was proved at the trial, and would unquestionably avoid any assurance made to secure that bargain between the parties to it. The counsel for the demandant has, however, argued, that as the demandant was not party nor privy to that contract the assignment to him by John Williams ought not to be prejudiced by it. Whether he is right or not in this reply to the objection need not now be decided, provided another fact, which was submitted to the jury, and determined by them against the demandant, was sufficiently proved by competent evidence admitted at the trial; which fact so found is that the assignment by John Williams to the demandant was not made *bona fide*, nor for a valuable consideration, but was made in secret trust for the benefit of John Williams, so that nothing passed out of him by that assignment against creditors or purchasers. The court are of opinion that the evidence objected

to was rightly admitted by the judge, and that it fully warranted the verdict on this point. There was sufficient reason for the jury to presume that the deed of John Williams to the demandant was fabricated at a time subsequent to its apparent date, for the purpose of intercepting the trustee process mentioned in the report, and there was evidence of the acts and declarations of the demandant, tending to prove that he acted as the friend and trustee of John Williams.

As to the objection, that a trust of this nature cannot legally exist without a declaration in writing signed by the party who holds the legal estate, this does not apply to secret trusts and confidences created for the purpose of defeating or delaying creditors; which may always be proved by parol, and when so proved, render wholly inoperative the formal transactions which may have been adopted for such purposes by the parties. The case is to be considered, therefore, as if John Williams himself was the party now claiming to enforce his title derived from Catharine Williams, under the assignment made to secure a usurious loan of money.

In this light another objection is presented, namely: that usury cannot be given in evidence under the general issue, but ought to have been specially pleaded. It is, without doubt, generally true, that to an action brought on a specialty, the party intending to avoid the contract on the ground of usury must set forth the matter in a special plea. But we think this strictness applicable only to the original parties to the instrument, who are presumed to have full knowledge of the consideration, and may, therefore, be properly held to notify the other party of the intended grounds of defense. There seems also a technical difficulty in giving usury in evidence under a plea of *non est factum*, which does not apply to the issue in the present action, which is upon *nul disseisin*. But however this may be between the parties to the instrument intended to be avoided, we are of opinion that a subsequent purchaser of a title from a grantor who has already executed a conveyance to another, which by statute is void, is not holden to plead this matter, but may give it in evidence. He may not be apprized of such defense until it is too late to plead it; and, when he offers to prove it, the adverse party may always have time given him to rebut such evidence. No authorities have been cited by the counsel, or found by us, decisive of this point; but we think the principles of the common law on which pleading is founded fully justify this opinion.

Here there would be an end of the demandant's title; but, as another point was submitted to the jury, and we cannot discern whether upon this or the one already discussed their verdict was founded, it is necessary to examine the residue of the direction of the judge and see whether it was correct; for if it was not, a new trial must be granted. This point grows out of the trustee process instituted by Abraham Tuckerman, in 1806, in which process he sued John Williams, and summoned Catharine Williams as his trustee. In her disclosure she admitted that she owed John Williams the sum for which the assignment before mentioned was given as security. The summons was served upon her in March, 1806, one month after the deed from John Williams to the demandant bears date, but before it was proved to have been delivered. In this process and disclosure she did not attempt to avoid the debt on the ground of usury, probably being willing that it should be recovered by the person instituting the suit. In November, 1807, judgment was rendered against John Williams for a large sum, and also against Catharine Williams for the goods, effects and credits of John Williams in her hands, she having been adjudged trustee by the court. Now, if she was rightfully adjudged trustee in that process, and has paid over to the judgment-creditor the amount due to John Williams pursuant to the judgment, which she may be considered to have done by the transaction between her, the tenant and the judgment-debtor, then the assignment to John Williams, which was only a pledge for his debt, cannot be set up by him against her release to the tenant, nor by the demandant because of the trust before mentioned.

The objection to this position of the case by the demandant's counsel is, that Catharine Williams was never the debtor of John Williams; that having given no bond or note collateral to the assignment, that was not to be considered in nature of a mortgage; but as a conditional sale, to be void on payment of money as expressed in the condition; the assignee having no personal right of action for the money, as there was no covenant for payment in the deed. And this would be the true character of the transaction, were it not for the verbal promise to pay, which was satisfactorily proved in the case. The cases cited, and especially that from the reading of the learned Judge Trowbridge on Mortgages, 8 Mass. 568, sufficiently establish the law to be, that in a conditional sale like those above described, the grantor is not a debtor, and cannot be compelled to pay otherwise than by the land pledged. But this case is

wholly different from a conditional sale; for here there was a direct and positive promise to pay; and there having been a valuable and adequate consideration advanced, an action would undoubtedly have lain by John against Catharine Williams upon that promise.

The assignment must, therefore, be considered as a mortgage, collateral to the oral promise; and so Catharine was the debtor of John Williams, and the debt liable to be taken by the trustee process by his creditors. The direction of the judge, therefore, on this part of the case was correct, and we are all satisfied that judgment ought to be entered upon the verdict.

The language of the Chief Justice, that a secret trust or confidence, created for the purpose of defeating or delaying creditors, may always be proved by parol, and when so proved renders "wholly inoperative" the formal transactions which may have been adopted by the parties for such purpose, is approved of in *Harrie v. Sumner*, 2 Pick. 137, and the principle cited and relied upon in *Rice v. Cunningham*, 116 Mass. 469, and in *Robinson v. Bliss*, 121 Mass. 430.

LAMB v. DURANT.

[12 MASS 54.]

SALE OF VESSEL BY PARTNER.—Where a ship at sea belonging to a partnership was sold by one of the partners at home, and subsequently sold and possession delivered by the other partner abroad under whose control she then was, and who had no knowledge of the prior sale, it was held that the second sale passed the title as against the former.

INDEBITATUS ASSUMPSIT for money had and received, brought by James Lamb and another against Cornelius Durant. The case was submitted upon an agreed statement of facts: Prior to February, 1810, the brig Louisa was owned, one moiety by the defendant, the other moiety by John Maynard and Robert Lamb, partners under the firm name of Maynard & Lamb. On the third of February, the brig being at sea on a voyage to the West Indies, under the care of John Maynard, also the consignee, Robert Lamb, having a general power of attorney from his partner, executed an absolute bill of sale, in the name of the firm, of their moiety of the vessel, to the plaintiffs, to whom the firm was indebted in a sum exceeding three thousand dollars, expressed as the consideration in the bill of sale. On the twenty-first of February, while the vessel was at St. Croix, Thomas Durant, hearing that the firm of Maynard & Lamb was embarrassed, demanded the payment of his debt. At the re-

quest of Maynard, the defendant assumed the debt, and took, in consideration, a bill of sale of the firm's interest in the vessel, executed by Maynard. Defendant immediately took possession of the vessel, sent her to Wilmington, North Carolina, and there obtained a new register in his own name. After taking a cargo on board for the West Indies, which he there sold on his sole account, he sailed to Boston, where he sold the whole of the vessel, after a demand by the plaintiffs for their moiety pursuant to their bill of sale. Plaintiffs objected to the sale.

Otis and Bigelow, for the plaintiffs.

Amory and Dexter, contra.

By Court, PARKER, C. J. Two questions arising in this case are important in a commercial point of view, and deserve a deliberate consideration.

The first question respects the title of the plaintiffs under their bill of sale of the third of February. It was made in good faith, and upon a valuable consideration; and, if the authority of Robert Lamb was sufficient to convey the interest of his partner, their title would be good against any creditor of the house. For, although the vessel was then abroad, so that a delivery could not take place, it is well settled by a number of decisions in this country and in England that such a conveyance by deed of a vessel at sea, passes the property; it being only necessary that possession should be taken under the conveyance as soon as the vessel returns within the control of the purchaser. With respect to the authority of Robert Lamb, to sell his partner's interest, it cannot result merely from his being a part-owner of the vessel; for part-owners are only tenants in common, and one of them cannot, by his sole act, transfer the property of another, unless under circumstances which furnish a presumption of an assent by him who does not join in the conveyance. Nor is any stress to be laid upon the general power of attorney held by Robert Lamb from his partner; for it cannot be supposed that such a power, from an absent partner, could be left to be used about the partnership concerns or property. The object of it probably was, the care of the private concerns of Maynard in his absence.

The authority, then, which Robert Lamb had, to convey the interest of his partner in the vessel, must result from their relation as general partners; and we think this sufficient. There would probably be no doubt of the power of one partner to dispose of any other partnership effects. Such a power seems

necessarily to result from the connection. One is frequently absent; and, in such case, the other must have the whole authority of both, or the business would stop. One may contract debts for the house, or may release and discharge debts; may purchase merchandise or vessels, if the nature of their business requires it; may draw or indorse bills of exchange, and make or indorse promissory notes. Indeed, there seems to be scarcely an act contemplated to be done by merchants, which one copartner, acting for both, cannot do as effectually to bind the whole copartnership, as if each member acted. This is laid down expressly by Watson, the only writer who has treated distinctly and separately upon the subject of partnerships; and there is no book of legal authority denying his positions.

The only room, then, for question, is upon the distinction suggested between vessels and merchandise, or other effects of a partnership. The superior importance, generally, of this species of property, and the greater solemnity practiced in conveying it, has given some weight to this suggestion, and has caused us to hesitate upon this point. But upon full consideration we see no ground for supporting it. Vessels owned by a copartnership are certainly effects of the copartnership, and not unfrequently the principal effects. Occasion for selling them frequently arises in the course of business; and notwithstanding they are commonly conveyed by an instrument under seal, they may pass by delivery only, as well as any other chattel, so far as respects the property of the vessel. No exception from the general authority of a partner, relative to partnership effects, can be found in favor of vessels; and there seems to be no reason for such exception. Each partner, acting fairly and without fraud, has the authority of the whole firm; and it would tend much to embarrass mercantile business if this were not the case; as one of the principal objects of uniting in a commercial copartnership is the facility of transacting business in different places frequently at great distance from each other, at the same time. No one can doubt that a contract made by one partner to sell a ship belonging to the firm would be binding upon the firm, so as to subject it to damages if the contract should not be performed. And there seems to be no reason why the same thing may not be done, which may be contracted to be done. We think then that Robert Lamb, in the absence of his partner, had authority to sell the moiety of the brig, as part of the partnership effects, and so far the title of the plaintiffs is made out.

But it is necessary to compare it with the title of the defendant, and to see which has the preference. The same authority, which by virtue of the copartnership was vested in Robert Lamb, was also possessed by his partner Maynard. The title, therefore, of the defendant, under his conveyance from Maynard, is valid, unless the title of Maynard and Lamb had been before divested by the bill of sale to the plaintiffs, which was prior in point of time. But the sale to the plaintiffs, although absolute in its terms, was not complete and perfect for want of a delivery of the vessel. All the writers upon the subject of the transfer of a ship at sea speak of a subsequent possession within a reasonable time as necessary to complete the transfer, at least with respect to creditors. And in the case in our own books, *The Portland Bank v. Stubbs*, 6 Mass. 422 [4 Am. Dec. 151], it was decided that when a ship at sea is transferred the purchaser takes her subject to all incumbrances upon her before notice of the transfer. This doctrine seems to be reasonable and necessary to secure the interests of persons abroad, who may have lawfully acquired a lien upon the ship, and who can have no means of knowing anything done to affect the title by an owner at home after the sailing of the ship. Thus, if the vessel should be hypothecated abroad after a sale of her at home, the hypothecation would take the place of the sale. So if she should be chartered or let to freight by the master or supercargo, having authority, the transfer at home must be subject to these charges upon the vessel abroad.

In the case at bar, the brig *Louisa* was at St. Croix on the twenty-first of February, eighteen days after the transfer made by Robert Lamb, having on board Maynard, being part-owner and general partner with the other part-owner, and also consignee of the vessel, he with his partner owning a moiety of the vessel. A creditor of the partners hearing of the difficulty of the house, presses for payment, and has it in his power to arrest the vessel to secure his demand. A third party, at the request of the partner, purchases the vessel and pays the debt, and immediately the vessel is delivered to the purchaser, who sends her to sea as his own property, and causes her to be documented in his own name. At this time no knowledge exists in any of the parties to the transaction that the partner at home had conveyed the vessel. Here we think a complete and perfect title is obtained, and that it necessarily intercepts the title attempted to be passed by the conveyance from Robert Lamb. Under such circumstances there could be no doubt that Maynard

might have mortgaged the moiety of the brig to Thomas Durant for the security of his debt, and that such mortgage would have preference over the sale by Robert Lamb. It would be an incumbrance upon the vessel legally made abroad, to which the sale at home must be subject, according to the principle laid down in the case of *The Portland Bank v. Stubbs*. And if a mortgage would have this effect, no reason can be given why an absolute sale, made for the purpose of paying a partnership debt, and relieving the vessel from detention, should rest upon different principles.

We are, therefore, of opinion that the title of the whole vessel was legally in the defendant, so that no action lies for the plaintiffs for the proceeds of the sale, or for the earnings of the vessel.

Let the plaintiffs become nonsuited.

As to the power of one copartner to execute a valid transfer of a vessel belonging to the firm, either absolute or conditional, this case is relied on in *Patch v. Wheatland*, 8 Allen, 103. Upon the doctrine that where goods are sold to two different persons by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other; this case is cited in *Lawfear v. Sumner*, 17 Mass. 113; *Badlam v. Tucker*, 1 Pick. 396. This case is further cited in *Bixby v. Franklin Ins. Co.*, 8 Pick. 89, and *Pratt v. Parkman*, 24 Id., 47, as to the manner in which a valid sale of a vessel may be made.

FARNUM v. FOWLE.

[12 MASS. 89.]

NOTE MATURING ON SUNDAY.—When a bill or note is payable with grace, and the last day of grace falls on Sunday, such bill or note becomes due on Saturday, and demand should be made and notice given accordingly.

MAKER'S INSOLVENCY AFFECTING NOTICE.—The known insolvency of the maker of a promissory note, for six months previous to, and at the time of making the note, will not excuse the holder from a seasonable demand, and due notice to the indorser.

ASSUMPSIT on a promissory note dated November 12, 1812, signed by John Fowle, and made payable six months from date with grace to the defendant, or his order, by whom it was indorsed to the plaintiff. A nonsuit was granted, and a motion to set the same aside was submitted upon the following statement of facts:

The six months, including the days of grace expired May 23, 1813, which was Sunday. The plaintiff and the promisor lived in Boston, the defendant at Northampton. On the twentieth

May, the day on which the note would have been due, without grace, the plaintiff demanded payment of the maker, and sent a letter to the defendant requesting payment. On Monday the twenty-fourth, the plaintiff again demanded payment of the maker and placed a letter in the post-office directed to the defendant, notifying him of the demand and refusal on the part of the maker, and asking payment of the defendant. It appeared that the letter was too late for the Monday morning's mail, and as the mail left Boston for Northampton on Monday, Wednesday and Friday mornings only, the letter did not reach defendant until the twenty-sixth of May. It was in evidence that John Fowle, the promisor, was notoriously insolvent six months before the making of the note and ever since.

Peabody, for the plaintiff.

Parsons, contra.

By Court, PARKER, C. J. The demand made upon the promisor on the day when the note was supposed to be due, without reckoning the days of grace and the notice to the indorser predicated upon that demand were wholly nugatory; it having been settled in the case of *Jones v. Fules*, 4 Mass. 245, that the days of grace must be computed, to ascertain when a note so payable becomes due. It is also settled, as a part of the law-merchant, that, when a note or bill is payable with grace, and the third day of grace falls on Sunday, or any other great holiday, when money is not usually paid it becomes due on the second day of grace, namely on Saturday: Chitty, 141; Ld. Raym. 743; Bayley, 34. This principle is adopted and practiced upon in this commonwealth, as part of the law-merchant, so far as respects Sunday. As there are here no fixed and established holidays on which all business is suspended, perhaps no day but Sunday can be considered as legally reducing the time of payment as expressed in a bill or note. The note sued in this action was, therefore, payable on the twenty-second and not on the twentieth or twenty-fourth of May.

Parties are always supposed to make their contracts with reference to their legal effect, and are not excused from any duty imposed by law, merely because they may be ignorant of the law. The plaintiff, in this case, holding a negotiable note was bound, if he would charge the indorser, to demand payment of the maker on the day it became due, *Henry v. Jones*, 8 Mass. 453, there being no circumstances to justify a delay which sometimes is unavoidable, and therefore excusable, as in the case of

Freeman v. Boynton, 7 Mass. 483. He made no demand until the twenty-fourth, although, by the terms of his note, it was due on the twenty-second. By this negligence, he has lost his remedy against the indorser whose contract was to pay only in case payment should be refused by the maker, if demanded of him when the note become due. In consequence of the delay in making the demand, there was also a delay in giving the notice; for by the course of the mail, the letter to the indorser could not leave Boston until Wednesday morning; whereas, had the demand been made on Saturday, notice might and ought to have been forwarded by the mail which left Boston on Monday morning.

It was urged, in the argument for the plaintiff, that when the note was made and indorsed, the promisor was notoriously insolvent; so that the indorser ought to be considered as engaging at all events to pay, and the notice to him of non-payment would have answered no valuable purpose. But we are to decide upon the contract as the parties made it, and not to suppose it to be a different thing from what its terms import. Had they intended an absolute and unconditional engagement on the part of the indorser, a joint and several note, or a guaranty would have been adopted, instead of a security by indorsement. Whatever doubt may have existed heretofore of the liability of an indorser upon the note of a person notoriously insolvent, it is now settled by the case of *Sandford v. Dillaway*, 10 Mass. 52 [6 Am. Dec. 99], that such a fact has no effect upon the contract. And it is rightly settled; for notice in such case may be as important as if the maker was solvent at the time of making the note and afterwards become insolvent. Indeed to admit a construction of a written contract, totally different from the natural force and effect of the terms made use of, or from their known legal operation, supposed to be contemplated when it is made, would be to violate one of the most wholesome principles of the law, that written contracts shall not be contradicted or essentially varied by parol testimony.

It was suggested in this case, as in many others, that it is hard to confine parties to a day in transactions of this nature; especially when no change of circumstances appears to have resulted from the delay. But the hardship, if any, arises from a fluctuation of opinions and an uncertainty as to rules; and seldom from an inflexible adherence to them, because when it is once known that exactness in the performance of duty is to be required, parties will adapt themselves to such a state of

things, and be always diligent and punctual to avail themselves of their contracts. To relax one day is, in point of principle, as much a departure from law as if a month or a year were suffered to elapse. The law itself provides for casualties, and the distance of parties to be affected with notice; and any other indulgence would introduce a state of confusion with respect to mercantile contracts, productive of much greater hardships and inconvenience, than the most strict application of known rules.

The motion to set aside the nonsuit is overruled.

As to the necessity of demand on the day of maturity of the note, this case is cited in *Staples v. Franklin Bank*, 1 Met. 49; and to show that such demand or inquiry for the maker is not excused by the absconding of the maker, it is also cited in *Pierce v. Oate*, 12 Cush. 192. See, upon this last point, *Putnam v. Sullivan*, 3 Am. Dec. 206.

LORD v. DALL.

[12 Mass. 115.]

INSURANCE ON LIFE.—A policy of insurance upon life is a legal and valid contract.

INSURABLE INTEREST.—A single woman, dependent on her brother for her support and education, has a sufficient interest in his life to entitle her to insure it.

ILLEGAL OCCUPATION OF INSURED.—And the fact that the brother was engaged in an illegal trade will not of itself deprive her of her right to recover on the policy, she not having known of such illegal employment, nor having participated therein.

ASSUMPSIT on a policy of insurance, made for five thousand dollars, in favor of the plaintiff, upon the life of her brother Jabez, aged thirty-three years, bound on a voyage to South America, or any other place he might proceed to from Boston, commencing the risk on the sixteenth of December, 1809, at noon, and to continue until the sixteenth of July, 1810, at noon, for a premium of seven per cent. It appeared in evidence that Jabez died, within the time limited, on the coast of Africa, whither he had sailed as supercargo of a vessel engaged in the slave-trade. It did not appear that the plaintiff knew where her brother was bound when he left Boston.

A verdict was taken for the plaintiff, subject to the opinion of this court, on the points made by defendant: 1. That plaintiff had no insurable interest in the life of her brother; 2. That there had been a concealment of the intention of Jabez to go to

Africa; 3. That the policy was void, it being to secure the life of a person engaged in an unlawful enterprise.

Prescott and Hubbard, for the plaintiff.

Livermore and Sullivan, *contra*.

By Court, PARKER, C. J. It has been a question in the argument whether a policy of assurance upon a life is a contract which can be enforced by the laws of this state; the law of England, as it is suggested, applicable to such contracts, never having been adopted and practiced upon in this country. It is true that no precedent has been produced from our own record, of an action upon a policy of this nature. But whether this has happened from the infrequency of the disputes which have arisen, it being a subject of much less doubt and difficulty than marine insurances, or from the infrequency of such contracts, it is not possible for us to decide. By the common principles of law, however, all contracts fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the laws, or to good morals, are valid, and may be enforced or damages recovered for the breach of them. It seems that these insurances are not favored in any of the commercial nations of Europe, except England, several of them having expressly forbidden them, for what reasons, however, does not appear, unless the reason given in France is the prevailing one, namely: "That it is indecorous to set a price upon the life of man, and especially a freeman, which as they say is above all price." It is not a little singular that such a reason should be advanced for prohibiting these policies in France, where freedom has never been known to exist, and that it never should have been thought of in England, which for several centuries has been the country of established and regulated liberty.

This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it which leads to the violation of law, nor anything objectionable on the score of policy or morals. It must, then, be valid to support an action, until something is shown by the party refusing to perform it, in excuse of his non-performance. It is said, that being a contract of assurance, the law on the subject of marine insurance is applicable to it; and, therefore, unless the assured had an interest in the subject-matter insured, he is not entitled to his action. This position we agree to; for otherwise it would be a mere wager-policy, which we think would be contrary to the general policy of our laws and therefore void. Had then the

plaintiff an interest in the life of her brother, which was insured?

The report states the facts upon which that interest was supposed at the trial to exist. The plaintiff, a young female without property, was, and had been for several years, supported and educated at the expense of her brother, who stood towards her *in loco parentis*. Nothing could show a stronger affection of a brother towards his sister than that he should be willing to give so large a sum to secure her against the contingency of his death, which would otherwise have left her in absolute want. One per cent. per month upon five thousand dollars, taken on the life of a man thirty-three years of age in good health at the time, was a sufficient inducement to the underwriter to take at least common chances, and proved the strong disposition of the brother to secure his sister against the melancholy consequence to her of his death. In common understanding no one would hesitate to say that in the life of such a brother the sister had an interest; and few would limit that interest to the sum of five thousand dollars.

But, it is said, the interest must be a pecuniary, legal interest, to make the contract valid; one that can be noticed and protected by the law; such as the interest which a creditor has in the life of his debtor, a child in that of his parent, etc. The former case, indeed, of the creditor, would leave no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of the parent, the interest, except the insurable one, which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father, except as before stated. And yet a policy effected by a child upon the life of a father, who depended upon some fund terminable by his death to support the child, would never be questioned; although much more should be secured than the legal interest which the child had in the protection of his father. Indeed, we are well satisfied that the interest of the plaintiff in the life of her brother is of a nature to entitle her to insure it. Nor can it be easily discerned why the underwriters should make this a question after a loss has taken place, when it does not appear that any doubts existed when the contract was made, although the same subject was then in their contemplation.

As to the other objection, that the life insured was employed during the continuance of the contract in an illegal traffic, we

do not think it can prevail to the prejudice of the plaintiff, who did not participate in the illegal employment, and, indeed, does not appear to have known of it. The underwriters insure the life of Jabez Lord, for the benefit of the plaintiff, for the term of seven months; and he is described in the policy as being about thirty-three years of age, "and bound on a voyage to South America or elsewhere, and any other place he may proceed to from Boston." This gave the utmost latitude to Jabez Lord to go where he pleased at all times, and imposed no restriction whatever upon him as to the place where he should exercise his industry and enterprise. Possibly, if he secretly intended at the time the policy was subscribed, to visit some portion of the globe where his life would be exposed to more than common hazard, and kept that intention concealed from the underwriter; had he been interested himself in his policy, or had his sister been privy to his intentions, and aided him in concealing them, such conduct might have been considered in the light of a fraudulent concealment, and, if the fact were material the contract might have been avoided.

But the jury have found that there was no such concealment; and the objection now rests entirely upon the supposed illegality of the enterprise in which he was engaged. It is a sufficient answer to his objection that, whatever the law may be as to an insurance upon an illicit voyage, between the parties to the contract, the present plaintiff, being ignorant of any intended violation of the law, ought not to be affected by such illegality. Had the policy been effected for Jabez Lord himself, it might be questionable, as the underwriters had excepted no particular employment in which he might be engaged, and no cause of death but suicide, and forfeiture of life for crime, whether his engagement in any traffic prohibited by law would have discharged their liability. If it would, it must be only because it might be thought just and legal to discourage contracts which might tend to uphold enterprises forbidden by the laws. It would be difficult, however, to maintain that the executors of a man, whose life was insured for the benefit of his children, should be deprived of their right to enforce the contract because he had pursued a course of smuggling or counterfeiting; neither of these acts being excepted in the policy, and the party having died within the time, from a cause which was clearly at the risk of the underwriters. A policy made for the purpose of enabling a man to commit crime, would undoubtedly be void; but one honestly made would seem not to be affected by the moral conduct of the party who had procured it.

Perceiving nothing in this contract unfriendly to the morals or interests of the community, and had no knowledge of an illegal intention being imputed to the plaintiff, we see no reason for setting aside the verdict.

Judgment will therefore be entered upon it.

This case is of great interest, not alone from the fact that it is the earliest reported decision in this country upon the contract of insurance on life, but especially as examining the question of the interest in the life of another that will support such a contract, and laying down a principle that has been extensively relied on in later adjudications.

INSURABLE INTEREST.—Whether the relationship existing between parent and child, brother and sister, husband and wife, would of itself constitute an “interest” that might be the subject of insurance, has been a matter of considerable perplexity in those states where it has not been settled by statute. It is conceived, however, that by the course of the decisions, it has been established that such relationship alone is not sufficient to entitle one to insure the life of another; the interest must be in its nature pecuniary. The fact that the sister was dependent upon her brother for support was decisive of her insurable interest in his life in the principal case; and it is this feature of the case that is strongly insisted upon in subsequent cases that hold a mere relationship gives no insurable interest.

In the case of *Loomis v. Eagle L. & H. Ins. Co.*, 6 Gray, 399, the question came before the Court on a policy of insurance taken out by the father upon the life of his minor son. C. J. Shaw, after stating that the father had a direct pecuniary interest in the life of his son, being entitled to a share of his earnings, proceeds to say: “But on broader and larger grounds, we are of opinion that the assured had an insurable interest sufficient to maintain this action. * * * We cannot doubt that a parent has an interest in the life of a child, and *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating often more efficaciously than those of positive law.” This language, humane as it is, is *obiter* when the facts of the case are considered and thereby loses its force as a precedent. And in the subsequent case of *Forbes v. American Mutual Life Ins. Co.*, 15 Id. 249, it is said: “The question, what is such an interest in the life of another as will support a contract of insurance upon the life, is one to which a complete and satisfactory answer, resting upon sound principles, can hardly be said to have been given.” That case went off upon the peculiar terms of the contract, as expressed in the policy. The court, in *Stevens v. Warren*, 101 Mass. 564, say that, “The general rule recognized by the courts has been that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life,” and cite *Lord v. Dall*, and *Loomis v. Eagle Ins. Co.* This settles nothing as to the nature of such interest, whether it must be pecuniary, or may arise from relationship merely.

In *Mitchell v. Union Life Ins. Co.*, 45 Me. 104, an action on a policy effected by the plaintiff for his own benefit upon the life of a minor son, the court, in supporting the father's right to make the insurance, lay stress upon the circumstance that he had made large advances to the son, who was about

proceeding to California. "He (the father) has a pecuniary interest in the life of a minor child, which the law will protect and enforce." The Missouri courts hold that "the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child, merely in the character of husband or parent;" *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 424; *Gamb v. Covenant Mutual Life Ins. Co.*, 50 Id. 48. The support which the law imposes upon the husband as a duty towards his wife is such a pecuniary advantage as will give her an insurable interest: *Gamb v. Covenant Mutual Life Ins. Co.*, *supra*; so, also, *Baker v. Union Mutual Life Ins. Co.*, 43 N.Y. 823; *Thompson v. American etc. Ins. Co.*, 46 Id. 674. In *Equitable Life Ins. Co. v. Paterson*, 41 Ga. 338, a case where a policy was issued in the name of the wife upon the life of the husband, it appeared that the marriage was illegal and by the statute of that state void, and although the insurance company recovered, by reason of false representations at the time the policy was taken out, yet the court, passing upon the objection of want of pecuniary interest, say: "In this case, though the marriage was illegal, yet in fact the woman had an interest, and a deep interest in the life of the husband. He treated her as his wife. He supported her as such, she passed in society as such, and she was dependent upon him for support as such." And in *Chisholm v. Nat. Capitol Life Ins. Co.*, 52 Mo. 213, the court go still further and hold that a woman engaged to be married to a man has an insurable interest in his life. "Had he lived and violated the contract, she would have had her action for damages. Had he observed and kept the same, then as his wife she would have been entitled to support." There was certainly a pecuniary advantage to be derived from the continuance of his life, and as such susceptible of insurance. The supreme court of Connecticut, passing upon the insurable interest of one in the life of his brother, say, *Lewis v. Phoenix Mutual Life Ins. Co.*, 39 Conn. 104, "We think it a correct legal proposition, that the mere relationship of a brother is not such an interest as will support a policy of life insurance. The interest required to make such a contract valid must be of a pecuniary nature," and cite the principal case, with others above referred to: also, *Bevin v. Conn. Mutual Life Ins. Co.*, 23 Conn. 244.

In a recent decision of the supreme court of the United States, *Conn. Mutual Life Ins. Co. v. Schaefer*, 94 U. S. (4 Otto), 460, Justice Bradley, in delivering the opinion of the court, says: "It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor." When qualified by the sentence that follows, this statement conforms with the doctrine pervading the decisions heretofore quoted: "Indeed," continues Bradley, J., "it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another, creates an insurable interest in such life." It is the expectation of pecuniary advantage here laid down, that also furnishes a guide in the late case from Illinois: *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35. After an examination of the principles of previous decisions, the court say, that the mere relation of father and son, "did not constitute an insurable interest in the son in the life of the father, unless the son had a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father," and adopt the definition of May, Law of Insurance, sec. 107, that an interest in the life of another, to be insurable, must be "a well-founded expectation of pecuniary advantage from the continuance of the life insured, or risk of loss from its termination." The support a minor son is entitled to from his father, brings the interest of his son in the continuance

of his father's life within this definition. It might seem that the principle of *Reserve Mutual Ins. Co. v. Kane*, 81 Pa. St. 154, was in conflict with this position. The court there hold that a son has an insurable interest in the life of an aged father, whom the son was legally liable to support, saying: "Why, then, should he (the son) not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future?" The reasoning of this case is questionable, and as the court does not confine the ground of its decision to the relationship alone, but searches for some pecuniary interest which the son has in the life of his parent, the case may be considered as not materially affecting the course of decisions as has been herein traced.

It is well settled that a creditor has an insurable interest in the life of his debtor: *Bliss on Life Insurance*, sec. 27; *May on Insurance*, 108. The well-founded expectation of pecuniary advantage from the continuance of the debtor's life, or risk of loss from its termination, is apparent.

As to the effect upon a policy of the cessation of the insurable interest, it is stated in *Conn. M. Life Ins. Co. v. Schaefer*, 94 U. S. 461, an action brought by the wife upon a policy of insurance on the joint lives of the husband and wife, payable to the survivor on the death of either, they having been divorced *a vinculo matrimonii*, subsequent to the issuance of the policy: "We do not hesitate to say, however, that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself."

ADAMS v. BEAN.

[12 MASS. 137.]

GUARANTY WHEN BINDING.—Where a lease was made to two, reserving rent, and one of the lessees with the lessor executed it, a guaranty of the payment of the rent indorsed upon the lease by a third person, is binding upon the guarantor, although he stated at the time of indorsing that the instrument was not to be binding without the signature of the other lessee.

CONSIDERATION OF GUARANTY.—Permitting the lessees to occupy the demised premises in consideration of such guaranty, is a sufficient consideration for the undertaking of the guarantor.

ASSUMPSIT upon a written promise indorsed upon the back of a lease of a certain shop, made by the plaintiff to Weeks and Fifield. The lease was executed by the plaintiff and Weeks only, although written as if to be executed by Fifield also. The indorsement subscribed by the defendant was as follows: "This may certify that I, the subscriber, of Boston, etc., do guaranty the faithful performance, on the part of Daniel Weeks and Ebenezer O. Fifield, of the within agreement for value received." It appeared that, at the time the lease was executed, Fifield was out of town; and when the instrument was taken to defendant for his guaranty, he refused to make the indorse-

ment, because Fifield's name was wanting. Upon a second application defendant made the indorsement after having canceled the words "for value received," stating that the instrument was not binding without Fifield's signature. Plaintiff had no knowledge of the conversation between Weeks and the defendant. The shop was occupied by Weeks and Fifield in pursuance of the terms of the lease, until the rent accrued which is demanded in this action. It was proved that before making the lease Weeks agreed with the plaintiff to procure the defendant's guaranty for the rent. Fifield and the defendant were related by marriage, which was supposed to be the motive of his guaranty. Verdict for the plaintiff.

The defendant took the following exceptions: 1. That the indenture was inoperative for want of Fifield's signature and seal, and that the promise predicated upon it was void; 2. That it being a promise to pay the debt of another, it was void, there being no consideration expressed in writing; 3. That it appeared from the conversation between Weeks and the defendant that the instrument was not to be delivered unless Fifield's signature was obtained; so that there was no contract between the plaintiff and the defendant.

Monroe and the Solicitor General, for the plaintiff.

Bigelow, contra.

PARKER, C. J. There can be no doubt that the covenants in the lease were binding upon Weeks, although Fifield, who was intended to be a party to it, never executed it. Each party would have been bound jointly and severally, had both executed the indenture; and the execution by one who took possession under the lease must have made the contract complete as to him. As to the second question, whether the defendant is liable on his promise, which although in writing contained no words showing the consideration for which it was given; it is to be observed that it has never yet been determined in this commonwealth that such particularity is necessary. But if it had been so decided, we think a written engagement upon the back of a lease, that the parties to it should perform their undertakings, sufficiently expresses the consideration. For it may and ought to be presumed that the lease would not have been obtained without such guaranty, and the permitting of one to occupy in consideration of the promise in writing of another to pay the rent, is, we think, sufficient to raise a consideration of the promise.

The third objection is answered by the verdict of the jury. It surely cannot be pretended that a party, knowing of a formal defect in an instrument, which he undertakes shall be performed by one of the parties, shall take advantage of such informality as against one who may be ignorant of the defect. If the guaranty was intended to be delivered as it was, the defendant reserving to himself a right to set up the defect whenever he should be called upon to perform his promise; this would be a fraud which would not entitle him to any favor, beyond what strict law would give him. The jury have found that the writing was intended to be delivered without regard to the procuring of Fifield's name to the lease, and they determined rightly upon the evidence reported.

Judgment on the verdict.

As to the sufficiency of the consideration for the guaranty, this case is cited in *Crocker v. Gilbert*, 9 Cush. 134. And relying upon this case the court holds in *Russell v. Annable*, 109 Mass. 76, and in *Mattoon v. Barnes*, 112 Id. 467, that a party who signs and delivers an instrument is bound by the obligations he therein assumes, although it is not executed by all the parties named in it.

STORY v. ODIN.

[13 MASS. 157.]

EASEMENT OF LIGHT AND AIR IMPLIED.—Where the owner of land, with a house thereon, sold the house without any exception, or any reservation of a right to build on the adjoining ground or to obstruct the lights in the house which he sold, he cannot afterwards stop those lights by building on the adjoining land, nor can he convey this right to another; and if either the grantor or his assigns build upon the adjoining ground so as materially to impair the beneficial enjoyment of the house sold, he will be liable to the grantee in an action, as for a nuisance without any reference to the time such easement was enjoyed.

ACTION on the case. The declaration stated that the plaintiff "before and at the time of committing the grievance hereinafter mentioned, was, and from thence hitherto has been, and still is lawfully possessed of a certain building or store, with the appurtenances, situate in said Boston, on Dock Square, so called, in which said building there were, and still of right ought to be, divers, to wit, two windows, and two doors, through which the light and air, during all the time aforesaid, ought to have entered, and still of right ought to enter, into the said building, for the convenient and wholesome use, occupation, and enjoy-

ment thereof. Yet the said Odin, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff, and deprive him of the use, benefit and enjoyment of the said building and its appurtenances on, etc., wrongfully and unjustly erected and raised a certain wall and building so erected and made, for a long time, to wit, from the day and year aforesaid, hitherto; by means of which the said premises, the said building with the appurtenances, during all the time aforesaid, was, and still is, greatly darkened, and the light and air were, and still are, hindered and prevented from coming and entering into and through the said windows and doors into the same building, and the same hath thereby been rendered and is close and uncomfortable, and the plaintiff entirely deprived of the use of the said doors; and the plaintiff hath thereby been, and still is, greatly annoyed and incommoded in the use, possession and enjoyment of his said building and the appurtenances; and also by means of the premises hath been obliged, for the obtaining light in his said building, to lay out and expend a large sum of money, namely, etc., in and about altering the roof of said building," etc.

The cause was tried upon the general issue. The evidence showed that the plaintiff, in the year 1795, less than twenty years before the commencement of the suit, purchased of the town of Boston the land on which his buildings were erected; and that there was then standing on said land a two-story building, with a door in each story opening into a vacant lot of ground then owned by the town, and encompassed by the building thus sold to the plaintiff, and by other buildings then owned by the town, but open on the side facing the market; which vacant lot had been, by permission of the selectmen, from time to time occupied and used by the several tenants of the surrounding buildings as a yard, and sometimes as a passage way, from whence they received goods into their several stores. The yard continued vacant, or occupied as before stated, until it was sold by the town in 1812 to the defendant, who soon after erected a building thereon, covering the whole ground, and adjoining the back wall of the said building belonging to plaintiff, and so obstructed the light and air; and also obstructed the light of two or three windows, which were fixed in the plaintiff's new building, corresponding to windows which were in the building which stood upon the ground when the plaintiff purchased from the town. It was proved, and so found by the jury, that the plaintiff's new building covered the same

ground which the old one did, and was erected on the same foundation; and that the old building had been standing, with the doors and lights aforesaid, more than sixty years before the commencement of the action.

It was agreed that if on these facts the action could be maintained, judgment should be entered upon the verdict found for the plaintiff; otherwise, the verdict was to be set aside and a new trial to be granted.

The defendant made a motion for a new trial on the grounds: 1. That the plaintiff did not declare for an ancient and prescriptive right to the windows and doors; 2. The plaintiff purchased the land and building in which the doors and windows were within twenty years before the commencement of the action; 3. The defendant purchased the land upon which he erected his buildings from the same proprietor who conveyed to plaintiff. The defendant therefore insisted that as the plaintiff proved the origin of his right and interest to be within twenty years, and has not prescribed for an ancient right, he cannot maintain the action against a proprietor who is grantee of the adjoining estate on which the said building is erected, and holds the said estate from the same grantor who granted to the defendant within twenty years.

Prescott, for the plaintiff.

W. Sullivan, for the defendant.

By Court, JACKSON, J. As to the first objection, we are satisfied on the authorities cited for the plaintiff (1 Vent. 237, 239; Com. Dig. Action on case, Nuisance E.; 2 Saund. 175) that it is unnecessary to set forth in the declaration that the house is an ancient house, or that the plaintiff is entitled by prescription to the easement in question; and the plaintiff might, if it had been necessary to his case, have proved such ancient right under this declaration. But the plaintiff's right of action in this case does not depend on the contiguity of the building; and we have not found it necessary to consider what would be the effect of the facts reported in that respect, nor what length of time would be necessary to give him such right as against a stranger.

The town of Boston in the year 1795, owned the two pieces of land now owned by the plaintiff and defendant. They then sold to the plaintiff the piece now owned by him. This piece then had upon it a building, like that afterwards erected by the plaintiff upon the same foundations, and with doors and windows corresponding to those in the new building. This grant

being without any exception, or any reservation of a right to build on the adjoining ground, or to stop the lights in the building which they sold, it is clear that the grantors themselves could not afterwards lawfully stop those lights, and thus defeat or impair their own grant. As they could not do this themselves, so neither could they convey a right to do it to a stranger.

No lapse of time was necessary to confirm this right to the plaintiff. He might have maintained his action for such a nuisance immediately after his purchase, as well as after a lapse of twenty or of forty years. This point was decided in the reign of Charles II., in the case of *Palmer v. Fletcher*, which was cited in the argument, and is reported in many books: 1 Lev. 122; 1 Sid. 167, 227; Raym. 87; 1 Keb. 553. One of the judges then dissented from that opinion, but we find no adjudication to the contrary in congress, nor in Viner, where the cases on this subject are collected; and in the case of *Rosewell v. Pryor*, 6 Mod. 116, the same principle is confirmed by Lord C. J. Holt. He says that "if a man have a vacant piece of ground, and build thereon a house with lights, and lets this house to another, and afterwards builds on a contiguous piece of ground, or lets the contiguous ground to another who builds thereon, to the nuisance of the lights of the first house, the lessee of the first house shall have an action on the case against such builder, etc., for the first house was granted to him with all the easements and delights belonging to it."

We are therefore satisfied upon authority as well as upon the reason of the thing, that the action is well maintained, and there must be judgment on the verdict.

In many cases in this country, this case has been erroneously cited in favor of the doctrine of a prescriptive right to an easement of light and air; but its authority on this point is not followed in Massachusetts, where the doctrine of ancient lights, as understood in England, is discarded: *Rogers v. Sawin*, 10 Gray, 376; *Kents v. Hugo*, 115 Mass. 204. In the last case, decided in 1874, the principal case is considered and explained, and shown to be no authority in favor of the English doctrine of ancient lights. The court say: "In *Story v. Odin*, 12 Mass. 187, which is the earliest American case, the law was stated in accordance with the English authorities. But it is to be observed that no suggestion appears to have been made of any difference between the laws of the two countries in this respect, and that the facts of the case hardly required a decision upon the general question. The building sold to the plaintiff had not only windows, but a door in each story, overlooking the vacant land retained by the grantor, and afterwards sold to and built upon by the defendant; and the tenants of the first building, and of other buildings surrounding the vacant land, had been accustomed to use it, with

the permission of the owner, as a passage-way for the purpose of receiving goods into the buildings, and of depositing empty casks and boxes. The only objections made to the maintenance of the action were: 1. That the plaintiff had not declared for an ancient and prescriptive right to the windows and doors; 2. That the plaintiff purchased his building within twenty years; 3. That the defendant purchased his land from the same grantor. Such were the circumstances under which a verdict was obtained for the plaintiff, and a motion for a new trial overruled."

The point decided in the case is referred to by Selden, J., in *Lampman v. Mills*, 21 N.Y. 513, who says: "I will refer, upon this point, to but a single American case, viz.: *Story v. Odin*, 12 Mass. 157. This was an action for stopping lights not alleged to be ancient. The essential facts of the case, and the point of the decision, are very clearly stated in the following extract from the opinion of Jackson, J.: 'The town of Boston, in the year 1795, owned the two pieces of land now owned by the plaintiff and defendant. They then sold to the plaintiff the piece now owned by him. This piece then had upon it a building, like that afterwards erected by the plaintiff upon the same foundations, and with doors and windows corresponding to those in the new building. This grant being without any exception, or any reservation of a right to build upon the adjoining ground, or to stop the lights in the building which they sold, it is clear that the grantors themselves could not afterwards lawfully stop those lights, and thus defeat or impair their own grant. As they could not do this themselves, so neither could they convey a right to do it to a stranger. No lapse of time was necessary to confirm this right to the plaintiff.' This case is important, because it expressly shows that the court considered the question, whether it is incumbent upon the purchaser to secure by covenant existing benefits not naturally belonging to the tenement purchased, but previously conferred upon it at the expense of other lands of the grantor; or whether the grantor must himself guard against transferring the right to such benefits. The conclusion, as we have seen, was, that such benefits remain attached to the tenement conveyed, unless the right to subvert them is expressly reserved."

From these references, it will be seen that the doctrine laid down in the principal case is, that where the owner of land sells a part, with a certain privilege or easement attached, necessary to its full enjoyment, where there is no express reservation, he cannot himself use another part, nor grant such right, so as to deprive the grantee of the first part of such privilege or easement. And this case is now cited as holding this doctrine: *James v. Jenkins*, 34 Md. 1.; *City of Quincy v. Jones*, 76 Ill. 231; *Ray v. Sweeney*, Court of Appeals, Kentucky, March, 1878 [see 14 Bush]; Washburn on Easements, 500. This is a doctrine well known to the common law; *Nicholas v. Chamberlain*, Cro. Jac. 121, is the leading case, and the one which has always been regarded as settling the law on this subject. Here "it was held by all the court, upon demurrer, that if one erects a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduits and pipes pass with the house, because it is necessary and quasi appendant thereto; and he shall have liberty by law to dig in the land for mending his pipes or making them new, as the case may require." To the same effect see: *United States v. Appleton*, 1 Sumn. 492; *New Ipswich Factory v. Batchelder*, 3 N. H. 190; *Lampman v. Mills*, 21 N.Y. 505.

EASEMENT OF LIGHT AND AIR.—It has been observed that this case has

been erroneously regarded as holding the English doctrine of an easement in light and air, but it is now no longer authoritative on this point. The English doctrine, whether it was in the common law or not at the time of our Revolution, was found entirely unsuitable to the policy of a new and growing country, and except in Delaware, New Jersey, Louisiana and Illinois it is discarded by our courts. In New York, in the leading case of *Parker v. Foote*, 19 Wend. 309, the doctrine is denied in an elaborate decision by Bronson, J.; Nelson, C. J., concurring, but Cowen, J., dissenting. Washburn, on Real Prop., Vol. 2, p. 346, thus summarizes the decisions: "The tendency of late years in this country has been against the doctrine of gaining a prescriptive right to the enjoyment of light and air, as an easement appurtenant to an estate, on the ground that it is incompatible with the condition of a country which is undergoing such radical changes in the progress of its growth. And while Illinois and New Jersey, as well as Louisiana, retain the common law on this subject as it has been understood in England, in New York, Massachusetts, South Carolina, Maine, Maryland, Alabama, Pennsylvania and Connecticut it has been discarded." In addition to these states which have discarded the common law on this subject, are Indiana, Kentucky and Iowa, in which the point has been lately raised and decided for the first time. In *Stein v. Hauck*, 56 Ind. 65, decided in 1877, the question came for the first time before the court, and the common law doctrine was discarded as inapplicable to our condition and policy. Biddle, J., noticing decisions in favor of the doctrine, remarks: "In *Robeson v. Pittenger*, 1 Green Ch. 57, it is held that when ancient lights have existed for upwards of twenty years undisturbed, the owner of an adjoining lot has no right to obstruct them, but this case was decided mainly on the authority of *Story v. Odin*, 12 Mass. 157, which has long ceased to be the law of Massachusetts; for in the case of *Randall v. Sonderson*, 111 Mass. 114, decided more than sixty years later, it is expressly held that 'it is the established law in this commonwealth that an easement of light and air cannot be acquired by prescription,' in support of which many cases are cited. In the case of *Durel v. Boieblanc*, 1 La. An. 407, where the easement of light to a window was coupled with the right of way through a passage, it was held that they could not be obstructed; but the decision was expressly placed upon the ground that these servitudes were visible and palpable, and on an examination of the property the purchaser must have seen them; the court remarking that, 'could we believe that he was ignorant of them, a very different case would have been presented.' In the case of *Gerber v. Grabel*, 16 Ill. 217, it is held that 'twenty years' uninterrupted and unquestioned enjoyment of lights, constitutes them ancient lights, in the enjoyment of which the owner will be protected.' But Caton, J., in a separate opinion, evidently doubts the wisdom of the rule, and Treat, C. J., dissented. These three cases are all the decisions we can find, and these three states—New Jersey, Louisiana and Illinois—the only states which have adopted the English rule concerning easements in light and air acquired by use or prescription, and the case in Illinois is the only one fully in accord with the English decisions, and is based upon a full adoption of the English common law by a statute of the state. * * * In Iowa the English doctrine is held inapplicable: *Morrison v. Marquardt*, 24 Iowa, 35. In *Powell v. Sims*, 5 W. Va. 1, the English common law of ancient lights was disapproved. Ohio has decided that an easement in light and air to be supplied to one's windows from the premises of another cannot be acquired by use or prescription: *Mullen v. Stricker*, 19 Ohio St. 135."

The question was recently, for the first time, presented to the court of ap-

peals in Kentucky in *Ray v. Sweeney* (March, 1878,) and Cofer, J. shows that, except in Illinois, New Jersey, and Louisiana, the English doctrine is discarded. It is here held that no easement of light and air can be acquired by prescription, and that the English law on the subject does not prevail in Kentucky. The opinion states that "there are, no doubt, cases in which the grant of the right to enjoy light and air flowing into windows over the land adjacent has been implied. As if A. sells a house with windows overlooking his adjacent land, and light and air through these windows are necessary to the comfortable enjoyment of the house, under some circumstances A. may not afterwards, by building on the adjacent land, or otherwise, obstruct the flow of light and air so as materially to interfere with the comfortable enjoyment of the house, but will be presumed to have granted with the house that which is necessary to its reasonable use and enjoyment: *Story v. Odin*, 12 Mass. 167; *Palmer v. Fletcher*, 1 Lev. 122; *Rosewell v. Pryor*, 6 Mod. 116; *United States v. Appleton*, 1 Sumn. 492. But this doctrine is not universally recognized. * * * But no case can be found in this country at least, in which it has been held that by the sale of a vacant lot in a town or city, the vendor parts, by implication, with the right to build upon his adjacent vacant lot so as to obstruct windows or doors placed by his vendee in a house erected on his lot."

There is a case in Delaware, however, where this position is held, *Olacson v. Primrose*, 15 Am. L. Reg. 6. The opinion in this case by Chancellor Bates, is remarkably able and exhaustive. The course of decisions in this country and England is traced, and the conclusion is reached that the doctrine of an easement in light and air was an old established one in the common law, and was placed on the same principle as other prescriptive rights, and that in the adoption of the common law at the time of the Revolution we necessarily incorporated such doctrine in our law, which should be observed by the courts, until the legislature thought fit to abrogate it.

In Maryland, in *Cherry v. Stein*, 11 Md. 24, the common law was denied to be in force; but in *Janes v. Jenkins*, 34 Md. 1, S. C. 6 Am. Rep. 300, an important limitation is placed on the doctrine previously laid down. In *Janes v. Jenkins*, it is held that where a common proprietor conveys, an easement or servitude of light may be implied under certain circumstances. The court adverts with approval to the statement of Addison on Torts, 90, where he says: "If the owner of a house and the surrounding land sells the house without the land, a free passage for so much light and air as may be reasonably necessary for the beneficial occupation and enjoyment of the house is impliedly granted by the vendor across his own adjoining unsold land unless the privilege is excluded by the express terms of the conveyance. The vendor, therefore, cannot build on his own adjoining land so as to obstruct the access of light and air to the windows of the house. Having granted the house, he can do no act in derogation of his own grant. And if he sells and conveys the house to one man, and the adjoining land to another, the purchaser of the adjoining land cannot build so as to darken or obstruct the windows of the house, although such adjoining land may have been described as building land, and the intention to build thereon may have been known to the purchaser at the time he purchased it." The court then say:

"The principle here asserted is well founded in the common law, and has been recognized and impliedly approved by this court in the case of *Cherry v. Stein*, 11 Md. 1. In that case the English doctrine in regard to ancient lights was rejected as being inapplicable here, because if adopted it would greatly interfere with and impede the rapid changes and improvements con-

stantly going on in our cities and villages. That doctrine, however, while founded in the presumption of grant, is evidenced and established by use and time only. But not so in the case of a common proprietor conveying two adjoining tenements to different persons, and the first granted tenement is at the time in the full enjoyment of windows overlooking the other. In such case the question is, what passed by the grant or conveyance? The grantor being the owner of both tenements, could, for the benefit of the tenement granted, fix upon his remaining tenement any servitude he thought proper. That being so, the relative rights and incidents of the two tenements must be taken as fixed at the time of severance by the first grant; and unless restrictive words are used, each will retain, as between the two, all such incidents and easements as are then openly and visibly attached to and used by it. And there is no exception to this rule in regard to light and air; though the right to light and air thus acquired is founded, as we have observed, in very different principles from those upon which the rejected doctrine of ancient lights is founded. The distinction is most obvious. We think, therefore, that it is plain the conveyance to Joseph W. Jenkins passed the full right to the free use and enjoyment of the lights in the wall as they then existed as an incident and appurtenance to the land conveyed and as appurtenant to the premises will pass therewith to all successive owners of the property. And as the grantor, after the conveyance, could not himself lawfully hinder or obstruct the light and air from those windows, and thus derogate from the grant, it is clear he could not transfer to the appellant any right to do so, and, consequently, the latter took the western lot with the servitude annexed for the benefit of the eastern lot:" *Story v. Odia*, 12 Mass. 157."

In *Doyle v. Lord*, 64 N. Y. 432, it is held that the grantee of a building and a portion of a lot on which it stood, could take no right to the light and air from the balance of the lot.

BREWER v. UNION INSURANCE CO.

[12 Mass. 166.]

FEAR OF CAPTURE NO GROUND FOR ABANDONING.—An American vessel was at Buenos Ayres when the news of the war between the United States and Great Britain reached that place; at the same time two British vessels of war were lying in the river below the vessel, whose commanders expressed their intention of capturing any American vessel that attempted to go to sea. From this cause alone the vessel was prevented from sailing, and an abandonment offered to the insurers. It was held there was no loss absolute or technical that would authorize an abandonment.

ASSUMPTION on a policy of insurance on the ship *Laura* and appurtenances at and from Boston to a port or ports on the river Plate, at and from thence to Boston, or port or ports of discharge in the United States, with liberty to touch at ports in Brazil on the outward and homeward passages. The plaintiff claimed for a total loss by reason of capture by British ships of war at Buenos Ayres. It appeared in evidence that the *Laura* arrived

at Buenos Ayres on the twelfth of September, 1812; and that on the sixth of October following news of the war between Great Britain and the United States was received. At that time the *Laura* was ready to proceed on her homeward voyage, but two British ships of war were lying in the Plate below Buenos Ayres, which would have to be passed in order to get to sea, and it was impossible to go down the river without being captured by them. The officers of these vessels had made it known to the master of the *Laura*, and to the masters of other American vessels then in Buenos Ayres, their intention to capture the American ships if they should attempt to go to sea. From this cause alone the *Laura* was prevented from sailing. In March, 1813, the master made his protest at Buenos Ayres, a copy of which was forwarded to plaintiff's agent, who immediately offered to abandon to the defendants. The abandonment was not accepted.

Pursuant to instructions the jury found for the defendants; whereupon the plaintiff moved for a new trial.

Prescott, for the plaintiff.

Hubbard, *contra*.

By COURT. We consider this case as coming directly within the principles laid down in the case of *Richardson v. Maine Fire and Marine Ins. Co.*, 6 Mass. 102 [4 Am. Dec. 92]. The offer to abandon was not founded on any loss, technical or absolute. There was no application of hostile force to prevent the sailing of the ship; and although her sailing would have been attended with imminent risk, yet, if that risk would authorize an abandonment, the fear of capture would become a peril insured against contrary to the decision before referred to. This is certainly a very strong case, but we cannot make new and nice distinctions. All the cases relied upon by the plaintiff's counsel were considered by the court, when they established the principle, that fear of a peril, however well grounded, will not justify an abandonment.

Judgment according to the verdict.

See for a similar decision, *Craig v. United Ins. Co.*, 5 Am. Dec. 222; and as to the right to abandon when the port of destination is actually blockaded, see *Schmidt v. United Ins. Co.*, 3 Am. Dec. 319.

HOMES v. DANA.

[12 Mass. 120.]

ACTION FOR MONEY SUBSCRIBED.—Where several persons agreed in writing to lend, for the establishment of a newspaper, the sums subscribed by them, the same to be paid to one of their number as agent, such agent may maintain an action against those subscribers who refuse to pay, to reimburse himself for money advanced upon the faith of the subscriptions.

INDERTATUS assumpsit for money laid out and expended by the plaintiffs' intestate, Ebenezer Larkin, for the use and at the request of the defendant. The plaintiffs gave in evidence, against defendant's objection, a paper subscribed by the defendant, and others, in which the subscribers agreed to lend to Everett & Monroe the sum set opposite their respective names, "on the following conditions, namely, that the same shall be put into the hands of Mr. Ebenezer Larkin, to be appropriated exclusively to the establishment and publication of a newspaper, to be called the Boston Patriot; and to be refunded in one year with interest, if the profits of said paper will admit, after paying all necessary expenses," allowing Everett a certain annual salary as editor, and agreeing to demand no more than their proportionate shares, after deducting expenses, if the profits were not sufficient to pay them in full; "it being understood that the said Ebenezer Larkin shall be considered our agent, to be consulted with respect to the appropriation of the money, and that he have a right at any time to inspect the books and accounts relative to said establishment." Larkin agreed to receive and appropriate the money, and accept the agency; and Everett and Monroe agreed to account with Larkin, and to repay to him all sums loaned by the subscribers, or their *pro rata*, as provided for in the subscription, at the end of one year. The amount subscribed, including the sum of one hundred dollars set opposite defendant's name, was one thousand dollars. It was proved that the intestate had advanced a large sum of money for the purposes set forth in the subscription; and the jury were charged that, if the intestate had advanced this money upon the faith of the subscriptions, in pursuance of the trust he had undertaken, it was money paid to the use of the defendant, and that the law would raise a promise on his part to pay.

Verdict for the plaintiff, and motion for a new trial.

Parker, for the plaintiffs.

J. T. Austin, *contra*.

By Court. As to the first objection taken by the counsel for the defendant, that the contract read in evidence was not admissible, because it was between other parties, it cannot prevail. The action is not founded upon the contract; but this was introduced collaterally, to show the circumstances under which the money was paid by the intestate to the use of the defendant. It is, in this respect, like a note or bond paid by one not a party, at the request of the obligor or promisor. In such a case there can be no doubt the instrument would be proper evidence, although between other parties.

Nor is the objection maintained, that this was a contract by the defendant merely to loan money, and therefore that no action would lie except for damages for the non-performance. The true ground of the action is, that by reason of the contract Larkin was led to confide in the engagement of the defendant, so far as to advance his own money for him; and the defendant and the other subscribers, having made Larkin the trustee, to receive and appropriate the money for objects of importance to them, were bound in equity and good conscience to restore it. The only question which could arise in this case was, whether Larkin was induced to advance his money by the subscription and by the confidence placed by him in the subscribers. The jury having so found, the verdict is unquestionably right.

Judgment according to the verdict.

The doctrine of this case is approved in *Farmington Academy v. Allen*, 14 Mass. 176, *post*, and in *Bryant v. Goodnow*, 5 Pick. 229, the court give the following interpretation of the principle here established: "When one subscribes, with others, a sum of money to carry on some common project, lawful in itself, and supposed to be beneficial to the projectors, and money is advanced upon the faith of such subscription, an action for money paid, laid out and expended, may be maintained to recover the amount of the subscription, or such portion of it as will be equal to the subscriber's proportion of the expense incurred." See, also, *Amherst Academy v. Cowle*, 6 Id. 438, citing the principal case.

See *Phillips Academy v. Davis*, 6 Am. Dec. 162 and note, as to liability of subscribers to a corporation not in existence at the time of subscription.

THURSTON v. HANCOCK.

[12 MASS. 220.]

LATERAL SUPPORT.—Where one built a house on his own land, within two feet of the boundary line, and ten years after the owner of the land adjoining dug so deep into his own land as to endanger the house, and the owner of the house, on that account, left it and took it down, it was held that the latter could not recover for injuries done to the building, but was entitled to damages arising from the fall of the soil into the pit so dug.

ACTION on the case. The facts appear from the opinion. Verdict for the defendants, and motion for a new trial.

Otis and Preston, for the plaintiff.

Aylwin and the Solicitor-General, contra.

By Court, PARKER, C. J. The facts agreed present a case of great misfortune and loss, and one which has induced us to look very minutely into the authorities, to see if any remedy exists in law against those who have been the immediate actors in what has occasioned the loss; but after all the researches we have been able to make we cannot satisfy ourselves that the facts reported will maintain this action.

The plaintiff purchased his land in the year 1802, on the summit of Beacon Hill, which has a rapid declivity on all sides. In 1804 he erected a brick dwelling-house and outhouses on this lot, and laid his foundation on the western side within two feet of his boundary line. The inhabitants of the town of Boston were at that time the owners, either by original title or by an uninterrupted possession for more than sixty years, of the land on the hill lying westwardly of the lot purchased by the plaintiff. On the sixth of August, 1811, the defendants purchased of the town the land situated westwardly of the said lot owned by the plaintiff; and in the same year commenced leveling the hill by digging and carrying away the gravel; they not actually digging up to the line of division between them and the plaintiff, but keeping five or six feet therefrom. Nevertheless, by reason of the hill, the earth fell away, so as in some places to leave the plaintiff's foundation-wall bare, and so to endanger the falling of his house as to make it prudent and necessary, in the opinion of skillful persons, for the safety of the lives of himself and his family, to remove from the house; and in order to save the materials, to take down the house, and to rebuild it on a safer foundation. The defendants were noti-

fied of the probable consequences of thus digging by the plaintiff, and were warned that they would be called upon for damages in case of any loss.

The manner in which the town of Boston acquired a title to the land, or to the particular use to which it was appropriated, can have no influence upon the question, as the fee was in the town, without any restriction as to the manner in which the land should be used or occupied.

It is a common principle of the civil and of the common law that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. The law founded upon principles of reason and common utility had admitted a qualification to this dominion, restricting the proprietor so as to use his own, as not to injure the property or impair any actual existing rights of another. *Sic utere tuo ut alienum non laedas*. Thus no man having land adjoining his neighbor's, which has been long built upon, shall erect a building in such manner as to interrupt the light or the air of his neighbor's house or expose it to injury from the weather or to unwholesome smells. But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege which by such act is impaired. Therefore it is that by the ancient common law no man could maintain an action against the owner of an adjoining tract of land for interrupting the passage of the light or the air to a tenement unless the tenement thus affected was ancient, so that the plaintiff could prescribe for the privilege of which he had been deprived; upon the common notion of prescription that there was formerly a grant of the privilege, which grant has been lost by lapse of time, although the enjoyment of it has continued.

Now, in such case of a grant presumed it shall for the purposes of justice be further presumed that it was from the ancestor of the man interrupting the privilege, or from those whose estate he has; so as to control him in the use of his own property in any manner that shall interfere with or defeat an ancient grant thus supposed to have been made. This is the only way of accounting for the common law principle which gives one neighbor an action against another, for making the same use of his property which he has made of his own. And it is a reasonable principle; for it would be exceedingly unjust

that successive purchasers or inheritors of an estate for the space of sixty years, with certain valuable privileges attached to it, should be liable to be disturbed by the representatives or successors of those who originally granted, or consented to, or acquiesced in, the use of the privilege. It is true that of late years, the courts in England have sustained actions for the obstruction of such privileges of much shorter duration than sixty years. But the same principle is preserved of the presumption of a grant. And indeed the modern doctrine, with respect to easements and privileges, is but a necessary consequence of late decisions that grants and title deeds may be presumed to have been made, although the title or privilege claimed under them is of a much later date than the ancient time of prescription.

The plaintiff cannot pretend to found his action upon this principle, for he first became proprietor of the land in 1802, and built his house in 1804, ten years before the commencement of his suit. So that if the presumption of a grant were not defeated by showing the commencement of his title to be so recent, yet there is no case where less than twenty years has entitled a building to the qualities of an ancient building, so as to give the owner a right to the continued use of privileges, the full enjoyment of which necessarily trenches upon his neighbor's right to use his own property in the way he shall deem most to his advantage. A man who purchases a house, or succeeds to one which has the marks of antiquity about it, may well suppose that all its privileges of right appertain to the house; and, indeed, they could not have remained so long without the culpable negligence or friendly acquiescence of those who might originally have had a right to hinder or obstruct them. But a man who himself builds a house adjoining his neighbor's land, ought to foresee the probable use by his neighbor of the adjoining land, and, by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience. This seems to be the result of the cases anciently settled in England upon the substance of nuisance or interruption of privileges and easements; and it seems to be as much the dictate of common sense and sound reason as of legal authority.

The decisions cited by the counsel for the plaintiff, 1 Domat, 800, 408; Fitz. N. B. 183; 9 Co. 59; Pal. 536; 1 Roll. Ab. 140; Id. 430; *Slingsby v. Barnard*, 1 Roll. 430; 2 Roll. Abr. 565; 2 Saund. 697; Co. Lit. 56, b; 1 Burr. 337; 6 T. R. 411; 7 East, 368; 1

Bos. & P. 405; 3 Wils. 461, in support of this action, generally go to establish only the general principle, that a remedy lies for one who is injured consequentially by the acts of his neighbor done on his own property. The civil law doctrine cited from Domat will be found upon examination to go no further than the common law upon the subject. For although it is there laid down that new works on a man's ground are prohibited, provided they are hurtful to others who have a right to hinder them, and that the person erecting them shall restore things to their former state, and repair the damages; from whence, probably, the common law remedy of abating a nuisance as well as recovery of damages; yet this is subsequently explained and qualified in another part of the same chapter, where it is said that, if a man does what he has a right to do upon his own land, without trespassing upon any law, custom, title or possession, he is not liable to damage for injurious consequences, unless he does it, not for his own advantage, but maliciously, and the damages shall be considered as casualties, for which he is not answerable. The common law has adopted the same principle, considering the actual enjoyment of an easement for a long course of years as establishing a right which cannot with impunity be impaired by him who is the owner of the land adjoining.

The only case cited from common law authorities, tending to show that a mere priority of building operates to deprive the tenant of an adjoining lot of the right of occupying and using it at his pleasure, without being subjected to damages, if by such use he should injure a building previously erected, is that of *Slingsby v. Barnard*, cited from Rolle. Sir John Slingsby brought his action on the case against Barnard and Ball, and declared that he was seised of a dwelling-house, *nuper edificatus*, and that Barnard was seised of a house next adjoining; and that Barnard and Ball under him, in making a cellar under Barnard's house, dug so near the foundation of the plaintiff's house, that they undermined the same and one half of it fell. Judgment upon the declaration was for the plaintiff, no objection having been made as to the right of action, but only to the form of the declaration. The report of this case is very short and unsatisfactory, it not appearing whether the defendant confined himself in his digging to his own land, or whether the house, then lately built, was upon a new or an old foundation. Indeed, it seems impossible to maintain that case upon the facts made to appear in the report, without denying principles which seem to have been deliberately laid down in other books, equally respectable as authorities.

Thus, in *Siderfin*, 167, upon a special verdict the case was thus: A., having a certain quantity of land erected a new house upon part of it, and leased the house to B., and the residue of the land to C., who put logs and other things upon the land adjoining said house, so that the windows were darkened, etc. It was holden that B. could maintain case against C. for this injury. But the reason seems to be, that C. took his lease seeing that the house was there, and that he should not any more than the lessor, render the house first leased less valuable by his obstructions. It was, however, decided in the same case, that if one seised of land leased forty feet of it to A. to build upon, and another forty feet to B. to build upon, and one builds a house, and then the other digs a cellar upon his ground, by which the wall of the first house adjoining falls, no action lies; and so, they said, it was adjudged in *Pigott v. Surry*. The principle of this decision is, that both parties came to the land with equal rights in point of time and title; and that he who first built his house should have taken care to stipulate with his neighbor, or to foresee the accident and provide against it by setting his house sufficiently within his line to avoid the mischief. In the same case it is stated, as resolved by the court, that if a stranger have the land adjoining to a new house, he may build new houses, etc., upon his land, and the other shall be without remedy, when the lights are darkened; otherwise when the house first built was an ancient one.

In Rolle's Abridgement, 565, A., seised in fee of copyhold estate, next adjoining land of B. erects a new house upon his copyhold, and a part is built upon the confines next adjoining the land of B., and B. afterwards digs his land so near the house of A., but on no part of his land, that the foundation of the house, and even the house itself, fall; yet no action lies for A. against B., because it was the folly of A. that he built his house so near to the land of B. For by his own act he shall not hinder B. from the best use of his own land that he can. And after verdict judgment was arrested. The reporter adds, however, that it seems that a man who has land next adjoining my land, cannot dig his land so near mine as to cause mine to slide into the pit; and, if an action be brought for this, it will lie.

Although at first view the opinion of Rolle seems to be at variance with the decision which he has stated, yet they are easily reconciled with sound principles. A man in digging upon his own land is to have regard to the position of his neigh-

bor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor. For, in so placing the house, the neighbor was in fault, and ought to have taken better care of his interest.

If this be the law, the case before us is settled by it, and we have not been able to discover that the doctrine has ever been overruled, nor to discern any good reason why it should be. The plaintiff purchased the land in 1802. At that time the inhabitants of Boston were in possession, and the owners of the adjoining land now by the defendants. The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbor at a convenient distance from him. He could not have maintained an action for obstructing the light or air; because he should have known that in the course of improvements on the adjoining land, the light and air might be obstructed. It is, in fact, *damnum abeque injuria*.

By the authority above cited, however, it would appear that for the loss of, or injury to, the soil merely, his action may be sustained. The defendants should have anticipated the consequences of digging so near the line; and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damage arising from his putting his house in a dangerous position.

The language of Lord Ellenborough, in *Stansell v. Jollard*, 1 Selw. N. P. 444, that "when a man builds to the extremity of his land, and has enjoyed his building for more than twenty years, upon analogy to the rule as to lights, he acquires a right to support, or, as it were, of leaning to his neighbor's soil, so that his neighbor cannot dig so near as to remove his support, but otherwise as to a house newly built," has been quoted in many subsequent decisions as establishing the doctrine that the right of support for one's building from the premises of another may be acquired by prescription. That a right to light cannot be acquired in this country by lapse of time merely has been shown in the note to *Story v. Odia*, ante; and that the opinion as to lateral

support expressed by Lord Ellenborough, *supra*, is not now followed in England or in the United States, is manifest from recent decisions.

PRESCRIPTIVE RIGHT TO LATERAL SUPPORT.—In the case of *Angus v. Dalton*, L. R. 3 Q. B. D. 85, this subject received a full and careful examination. The action was brought by the owner of a factory against the defendant for making an excavation under an adjoining building in such a manner as to leave part of the factory without sufficient support, thus causing it to fall. The buildings had been erected upwards of a hundred years, and apparently built about the same time; they had been occupied as dwellings until twenty-seven years prior to the accident, when the plaintiff's predecessor had converted his building into a factory by removing some of the inner walls and raising brickworks to serve as a chimney and supports for the floors. Although Lush, J., was of opinion that a right to the support of the factory by the adjacent soil had been acquired by prescription, Mellor, J., and Cockburn, C. J., held otherwise. As this is the first instance in which the question of lateral support was presented to an English court in banc, the case is of great importance; and the following extract from the opinion of the Chief Justice will be of interest: "Where land has been sold by the owner for the express purpose of being built upon, or where from other circumstances a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favor of such an easement, short of presuming a grant when it is undoubted that none has ever existed. But in the absence of any such circumstances, there is no form of easement in which, as it seems to me, the doctrine of presumption should be more cautiously and sparingly applied than the easement of lateral support. For this easement is obviously of a very anomalous character. In every other form of easement the party whose right as owner is prejudicially affected by the user has the means of resisting it, if illegally exercised. In the case of the so-called 'affirmative' easements, he can bring his action, or oppose physical obstruction to the exercise of the asserted right. Even in the case of another negative easement, and which is said to approach the more nearly to this—that of light—the supposed analogy entirely fails. For although no action can be brought against a neighboring owner for opening windows overlooking the land of another, there is still the remedy, however rude, of physical obstruction by building opposite to them. But against the acquisition of such an easement as the one here in question, the adjoining owner has no remedy or means of resistance—unless, indeed, he should excavate in his own immediately adjacent soil while the neighboring house is being built, or before the easement has been fully acquired, for the purpose of causing the house to fall. But what would be thought of a man who thus asserted his right? Or possibly, as in the present instance, he may have built to the extremity of his own land, and may require the support of his soil to uphold his own house, is he to endanger and perhaps destroy his own house by excavating under it for the purpose of preventing his neighbor from acquiring the right of support? The question, as it seems to me, answers itself. To say that by reason of an adjoining house being built on the extremity of the owner's soil, a right of support is to be acquired in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of any kind, appears to me to be repugnant to reason and common sense, as well as to the first principles of justice and right."

The character of the easement of lateral support is well set forth in this

opinion. Moreover, as a prescriptive right in the property of another can only be acquired by an adverse exercise of that right for the time and in the manner fixed by law, and must be such an invasion of that other's right as would give him a right of action for the injury occasioned, within the statutory time, can it be said that by erecting a building on one's own soil, such an invasion of the rights of an adjoining proprietor is thereby occasioned, as will give the latter a right of action against the former? What is the measure of the damages? It is an incident of an easement that it should be open and as of right, in order to raise the presumption of a grant. How can assent be presumed when no opportunity is offered to dissent? "Where the enjoyment was in its nature hidden, or, although it was apparent, there was no ready means of resisting it within the power of the servient owner, assent was not implied, and the influence of twenty years' time, therefore, not acknowledged." *Napier v. Bullock*, 6 Rich. (S. C.) 324, per Wardlaw, J., in passing upon the easement under consideration. So in *Gilmore v. Driscoll*, 122 Mass. 207, C. J. Gray says: "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of that land, which can be seen, or known, or interrupted, or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former." In the recent case of *Mitchell v. Mayor, etc., of Rome*, 49 Ga. 670, this question was presented to the court, and the same conclusion reached. Trippe, J., says: "The doctrine of presuming a right, by grant or otherwise, to easement, etc., exists where one is in the adverse use or enjoyment for a certain period of an incorporeal right. This use or enjoyment cannot be adverse, unless it be exercised in denial of the title, and in derogation of the rights of another owner. It cannot be adverse to another owner, unless he has a right of action on account of a wrong done him." After stating that the presumption of right, by grant or otherwise, may well apply to claims which relate to commons, markets, water-courses, and ways, and the like, the judge proceeds: "In all these instances there is an invasion on the property of another, or his beneficial interest in it is lessened. The wrong done may be redressed by immediate action. * * * But it is difficult, if not impossible, to see how this doctrine may be applied to those instances of easements, so called, where there is no possession of anything belonging to another, no encroachment upon another's right, no adverse user, in fact, nothing done whatever, against which another could complain, or for which an action could be brought, and no remedy existing, whereby to prevent such a presumption from arising." On sound principle, and the uniform opinions expressed in these recent decisions, it may be safely laid down that the owner of a building cannot, by lapse of time merely, acquire an absolute right to have it supported by the adjacent soil.

LATERAL SUPPORT OF SOIL.—Although some text-writers state that the right of having one parcel laterally supported by the other is a right which adjacent proprietors of land have by reason of their continuity, Washburn on Easements and Servitudes, sec. 429 *et seq.*; yet it is considered that the better rule is that as stated by Wood, in his Law of Nuisances, sec. 174: "Every land-owner has a right to have his soil preserved intact, as against its own weight and the ordinary effect of the elements. * * * No damage is recoverable except for the actual disturbance of the integrity of the soil." The examination of the authorities upon this point, as referred to in maintenance of the position taken by the last cited author, is exceedingly instructive.

DAMAGES.—Upon the question of the amount of recovery to which a land-owner is entitled, by reason of injuries caused by the excavations made upon the adjoining premises, the rule laid down in the principal case, though questioned in some single instances, establishes the correct measure, at least so far as the Massachusetts courts are concerned. In *Gilmore v. Driscoll*, 122 Mass. 199, an action to recover damages for the falling of plaintiff's land, together with a fence and shrubbery, into an excavation made in land adjoining from five to ten feet deep, the court, after an extensive examination of the cases in this country and in England, during the course of which they refer to *Thurston v. Hancock* as "the leading American case on this subject," assess the damages in an amount equal to the loss of and injury to the plaintiff's soil alone: "But she (the plaintiff) cannot maintain an action for the injury to her fences and shrubbery, because her natural right and her corresponding remedy are confined to the land itself, and do not include buildings or other improvements thereon." Id. 208. See, also, *Foley v. Wyeth*, 2 Allen, 131. In *Gilmore v. Driscoll* the court did not consider the question whether negligence on the part of the defendant would enlarge the measure of damages, so as to charge him for injuries to the improvements upon the soil, "because the case stated does not find that he was negligent, nor set out any facts from which actual negligence can be inferred." So in the case from 2 Allen it seems that though the injury to the soil, occasioned without negligence or unskillfulness, may be compensated for in damages, yet, to support an action for the falling of the building into excavations upon adjacent lands, there must be proof of want of due care or actual negligence. The injury to the soil is independent of any question of negligence: 122 Mass. 206; *Hay v. Coboes Co.*, 2 N. Y., 162; *Richardson v. Vermont Cent. R. R. Co.*, 25 Vt. 471; *McGuire v. Grant*, 1 Dutch. 363, in which case C. J. Green, said that, "the only true criterion of damages is the diminution in the value of the lot." Id. 368. That there must be proof of negligence to entitle to a recovery for injuries to the building, see *Panton v. Holland*, 17 Johns. 92; *Lasala v. Holbrook*, 4 Paige, 169, 173; *Richardson v. Vermont Cent. R. R. Co.*, *supra*; *McGuire v. Grant*, *supra*; *Beard v. Murphy*, 37 Vt. 99. The distinction between the responsibilities of a land-owner for injuries occasioned by digging on his own land, to the soil, and to the buildings upon the soil of an adjacent proprietor, is recognized in *City of Quincy v. Jones*, 76 Ill. 231. Justice Scholfeld, in delivering the opinion of the court, says: "If injury is sustained to a building in consequence of the withdrawal of the lateral support of the neighboring soil, when it has been withdrawn with reasonable skill and care to avoid unnecessary injury, there can be no recovery; but if injury is done the building by the careless and negligent manner in which the soil is withdrawn, the owner is entitled to recover to the extent of the injury thus occasioned."

The reason that a man may recover for an injury done to his land by an excavation in the premises of his neighbor, but not for an injury, by a similar act, to his buildings on that land, seems to be that every land-owner is entitled to have his land preserved intact, to have it remain as it was in its natural state. For any interference with this right the party so interfering is liable. But it is only to land unincumbered that this rule applies; and if one has so burdened his land with buildings as to increase the natural pressure thereof upon the adjacent soil, he cannot shift the consequences of such act upon his neighbor. The neighbor's responsibility for causing the fall of soil into excavations on his land remains the same; but if it appear that the falling was the result of weighty erections upon the adjoining land, his lia-

bility is removed. The party making the erections has contributed to the cause of the loss and, in order to recover must show a carelessness, negligence or want of due skill on the part of one digging upon his own land: *Beard v. Murphy*, *supra*; *Charles v. Rankin*, 22 Mo. 566; *Gilmore v. Driscoll*, *supra*; Washburn on Easements, etc., sec. 444; Wood on Law of Nuisances, sec. 178. And in this latter reference it is said: "In actions for injuries to the right of support, where liability is sought to be avoided, on the ground that there are erections on the plaintiff's land that contributed to the injury, it is incumbent on the defendant to make out his defense by clearly establishing the fact that the injury would not have resulted except for the erections." The distinction is recognized in *O'Neil v. Harkins*, 8 Bush, 650, where the court held that an ordinary fence was not such a structure as would by its weight so incumber the soil as to deprive the owner of his right to recover for loss to his realty without proving negligence or unskillfulness on the part of his neighbor in making the excavation.

EMERSON v. PROVIDENCE HAT MANUFACTURING CO.

[12 Mass. 287.]

PROOF OF ATTORNEY'S AUTHORITY.—Where an instrument under seal purports to have been executed by an attorney, and the authority of the attorney is disputed, before the instrument goes to the jury, the letter of attorney must be produced to the court, who are to judge of its competency. But in simple contracts, where the agent's authority may be proved by parol, the fact of signing and the power to sign are both questions for the jury, and the order in which they shall be proved is immaterial.

DELEGATION OF AUTHORITY.—Although a general agent of a trading company may have power to make promissory notes binding on the company, a sub-agent appointed by him would not have such authority.

ACTS OF SUB-AGENT, WHEN BINDING.—A sub-agent, appointed to purchase stock and sell goods for the company, may buy on credit if not prohibited; and a promissory note given by such sub-agent, not being binding on the company, will not extinguish the implied promise of the company to pay for articles so purchased.

ASSUMPTION on a promissory note, and for goods sold and delivered, being the same goods for which the note was given. The note was as follows: "Boston, January 20, 1810. For value received of Messrs. Emerson & Little, I promise to pay them, or order, seven hundred and thirty-one dollars and three cents, in twelve months and grace, for the Providence Hat Manufacturing Company. Frink Roberts." An objection to the note as evidence, until proof that Roberts was the agent of the company, with power to bind them, was rejected. It appeared from the testimony of Roberts and others, and from documents produced in evidence, that one Buffum, one of the company, was appointed the company's agent by common consent, under their

rules and constitution; that Roberts was appointed agent by Buffum to manage the company's business in Boston; that such appointment was in pursuance of a written agreement between Buffum and Roberts, who gave a bond for faithful performance; that Buffum kept the books of the company at Providence and had an account with Roberts as agent; that the note in question was given for a lot of furs, some of which were sent to Providence for the company's use, and the remainder was sold in Boston by Buffum's orders, on the company's account; that Roberts acted as agent in Boston only, and had a store there, over which was the sign, "Providence Hat Manufacturing Co's Store;" and that Roberts never had any intercourse with any of the company but Buffum, and did not know whether any other member knew of his appointment or not, if the entries in Buffum's books was not evidence of such knowledge on their part. The testimony of Roberts to these facts was objected to, but received. The jury were directed to find for the plaintiffs, which they did. Motion for a new trial.

Crane, for the plaintiffs.

Rockwood, *contra*.

By the Court, PARKER, C. J. Several objections have been made to the verdict in this case, which we will consider in the order in which they have been presented.

First. It is said the note offered to the jury and admitted by the judge, purports on the face of it to be the note of Frink Roberts, and so will not support the declaration: *Long v. Colburn*: 11 Mass. 97 [6 Am. Dec. 160.] But there is no color for this objection. The form of words is usual, when one person intends to sign for another; and the words, "for the Providence Hat Manufacturing Company," prefixed to Robert's name, must be considered as idle, and should be rejected, unless they designate the character in which he gave his signature.

It is objected, also, that the note was permitted to go to the jury, before it was proved to have been made under an authority from those it purports to bind. But it is immaterial whether the note or the evidence of its authority goes first to the jury who must determine both points. Where an instrument under seal appears to be executed by an attorney, and the authority of the attorney is disputed before the instrument shall be admitted to the jury, the letter of attorney shall be produced to the court, who are to judge of its competency to sustain the act of the attorney. But in all contracts made by agents or attorneys, in

which the authority may be proved by oral testimony, the facts of signing, and the power to sign are both questions entirely for the jury; and the order in which they shall be admitted is a matter of indifference.

The next question respects the competency of Roberts, whose testimony was received on the trial, and is essential to the support of the verdict. He can be objected to solely on the ground of interest; for, considering him in the light of an agent, he may testify in that character, and he is not so connected with the note as to be inadmissible on the grounds stated in the case of *Fenn v. Harrison*, 3 T. R. 757; and *Buckland v. Tankard*, 5 Id. 578, cited in the argument. On the point of interest, if he stands equally affected towards both parties he is competent; and any bias he may have towards one or the other goes to his credibility only. Now, by the note itself no interest can be imputed; because, *prima facie*, it does not charge him, but those for whom he signed; and from the facts testified by him, and which, for this purpose, may be considered as testified upon the *voir dire*, he is clearly as much interested on one side as on the other. For if, by his testimony the defendants are charged, as they have settled with him, and allowed him the amount of this note, they will have a right of action against him; and if they are discharged for want of authority in him to bind them in the note, the payees may consider it a note given by him personally, and may recover the amount of him. We are, therefore, satisfied that he is a competent witness.

These preliminary questions being thus disposed of we come to the principal point in the cause, which was ably argued by the counsel on both sides. The first question is, whether the note declared on can, from the evidence in the case, be considered as the note of the persons who have associated under the name of "The Providence Hat Manufacturing Company." It is obvious, that, to give it this character, an authority from the company must be proved to have been in Roberts who undertook thus to charge them. No direct authority has been proved, but it has been insisted that Buffum, viewed either as agent of the company, or as one of the associates to whom the principal conduct of the business was left by common consent, has, by his appointment, the evidence of which is in the case, constituted Roberts an agent of the company, with authority to bind them in this contract.

We are not satisfied that the plaintiffs are correct in the ground thus taken. If Buffum is to be viewed as an agent

deriving his authority from the choice of the company, his power must be considered to be limited by the terms of his appointment; and, although the general administration of the affairs of the company were intrusted to him, we see no power given him to appoint sub-agents. Nor can such power be implied, for a confidence is supposed to exist between principal and agent which is not communicated to sub-agents, selected and appointed only by the agent. There is no doubt that the clerks and other persons necessarily employed by Buffum to execute the business of the company, may be considered as servants of the company, as far as their instrumentality is necessary for the due execution of the general concerns of the company, according to the spirit of their association. Thus, in a concern so extensive, in which it was contemplated to monopolize, as far as possible, the business of selling hats, factors might be employed by Buffum to buy stock and sell the manufactures. But it is not necessary, nor would it be safe to allow persons of this description to make promissory notes, or other written contracts, to bind the company. It would be difficult to limit such transactions to cases beneficial to the company; and it would be unreasonable to commit their whole interest into the hands of a multitude of inferior agents, when they had appointed a principal one in whom they had reposed all their confidence. Nor, indeed, does it appear from the contract between Buffum and Roberts that such a power as is contended for was attempted to be given. There is a general power to buy and sell, but no power to sign notes or other securities. As far forth as credit may be the necessary result of buying and selling, the credit of the company, or of Buffum, might undoubtedly be pledged; for, in such case, it will be correspondent only to the advantage gained by them by such credit. But to this effect the power of giving notes is not necessary; and the exercise of it may be dangerous. Viewing Buffum, therefore, as an agent only, we are not satisfied that he could transmit the power vested in him of making the company answerable upon a promissory note, or other express promise to pay. And, on the other hand, if he is considered the principal of a trading-house, although in such case he would have power to bind the company to any extent in relation to the common concerns, yet we doubt whether he alone could authorize another person to do the same thing. At any rate the circumstances of notoriety attending this company, and their employment of Buffum as an agent, might prevent any person dealing with him as the whole

company, on the ground of his copartnership authority, from having an advantage of any exercise of authority by him beyond that which is incident to an agency.

There are cases where an authority to make simple contracts of a mercantile nature for another may be implied from a previous permission to do the same acts, or an acknowledgment of them after they are made. But this point cannot be raised in the present case, there being no instance proved of any other note having been given by Roberts; and the circumstances in evidence, from which the knowledge of the company may be inferred, that Roberts was holding himself up to the community as their agent, proving nothing more than that they knew he was buying and selling for them. Upon these considerations, we are of opinion that the case does not show competent authority in Roberts to make the note for the company, with which they are charged in the declaration.

But there is another view of the case, applicable to the count on *indebitatus assumpsit* for goods sold and delivered, which it is necessary to consider. If the goods have been sold and delivered to the company by the plaintiffs, through the instrumentality of Roberts, they must be held to pay for them, unless they have been discharged by some act of the plaintiffs themselves, with intent to discharge, or unless such be the legal effect of the transaction with Roberts.

Roberts was ostensibly the agent of the company for purchasing furs. He advertised himself as such by the sign over his shop-door, intended to invite customers in to trade with him in that capacity. This had remained long enough to raise a violent presumption, that many out of a hundred joint traders, being within forty miles of this town, between which and the place of their residence there was a constant intercourse of business, knew that Roberts assumed to act as their agent. Buffum, the managing partner, knew and permitted this act of notoriety. Besides which, the books of Buffum, kept for the inspection of the principal officers of the company, contained evidence that Roberts was considered an agent. The plaintiffs sold the goods, not to him personally, but to the company, as is proved by the note, which, although not binding on the company, is good evidence for other purposes to establish the plaintiffs' claim. The goods were also bought for the company, according to Roberts' testimony, and actually went to their use.

Now, under these circumstances, we think there could be no

question, if no note had been given, that a count on *indebitatus assumpsit* would have been well maintained. The transaction would come fairly within the authority of Buffum to Roberts, to buy and sell for the company; and that authority appears to be under no restriction, which would confine it to buying without credit. At any rate Roberts appears to have been held out to the world as general agent of the company in this particular business; and it is just and equitable, as well as legal, that they should suffer from his insolvency, rather than innocent persons who dealt with him on the faith of his agency. Between individuals a case of this kind would admit of no doubt; and this company can claim no exemption from the common liabilities of a trading company, on account of the number of the associates, or the formality with which they conducted their concerns.

The only question remaining seems then to be whether the taking of the note, in the form in which it was given, extinguished the implied promise which resulted from selling the goods. Now, although a negotiable promissory note, by the common law of this state, is holden to be a discharge of a simple contract on which it may be founded, yet such a note, to effect such purpose, must be what it was intended by the parties to be, and available in law to the party who may receive it. The company have refused to recognize the note in question as theirs; and, although by the operation of law it may be the note of Roberts himself, if the plaintiffs choose so to consider it, yet they are not bound to rely upon Roberts, to the prejudice of the legal claim they had upon the company. For it would be obviously unjust that a man, dealing with the authorized agent of another, and selling goods to the principal, as supposed at the time, and taking a written promise to pay which was intended to charge the principal, should be liable to have the promise denied by the principal, and be obliged in consequence to look only to the agent, who is generally much less responsible.

Judgment according to the verdict.

This case is extensively cited in subsequent decisions in Massachusetts upon the various points here established. In *Barlow v. Les Congregational Society*, 8 Allen, 463, and in *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass. 105, the case is cited as to the form of signing a promissory note by an agent to make it binding upon his principal. In *Sherman v. Fitch*, Id. 64, the court refer to this case as to what acts by a corporation will be evidence of an agent's authority. See also *Long v. Colburn*, 6 Am. Dec. 160 and note, as to a signature by an agent.

COMMONWEALTH v. KNIGHT.

[12 Mass. 273.]

PERJURY—SUFFICIENCY OF INDICTMENT.—In an indictment for perjury it is not necessary that it should appear whether the witness was subpoenaed or whether he attended voluntarily, or that the false testimony was given in answer to a specific interrogatory.

SAME—ALLEGATION OF JURISDICTION.—It is sufficient to allege, in such an indictment, that the perjury was committed in the trial of an issue duly joined, without an express allegation that the cause of action was within the jurisdiction of the court.

SAME—MATERIALITY OF EVIDENCE.—It is necessary that the indictment should aver that the facts respecting which the testimony was given, were material; or such materiality must clearly appear from the other facts set forth in the indictment.

INDICTMENT for perjury, charging that at a justice's court, holden before G. E. Vaughan, Esq., one of the justices of the peace, at, etc., on, etc., an action of trespass between, etc., came on to be tried in due form of law, and was then and there tried before, etc. The indictment further charged that upon the trial of the issue joined in said action between, etc., Joseph Knight appeared as a witness for and on behalf of the plaintiff, and was sworn and took his corporal oath to speak the truth, the whole truth, and nothing but the truth concerning the matters in question in the said issue, such oath being administered by G. E. Vaughan, Esq., having sufficient power to administer such oath; that upon the trial it became material to ascertain whether the defendant in that action committed the trespass or not, and although he produced two witnesses to show that Knight and one Fogg had in fact committed the trespass, yet Knight, maliciously intending to pervert the due course of law, did on, etc., at, etc., falsely, wickedly, maliciously and corruptly swear that he did not cut down a certain tree, being the trespass complained of. Wherefore, etc. Verdict, guilty; and motion in arrest of judgment on the following grounds: 1. Because it was not alleged in the said indictment that he, the said Joseph Knight was lawfully required to take the oath in the indictment mentioned; 2. Because it does not appear that the justice of the peace had any jurisdiction of the cause on trial before him, it not being stated in the indictment that the close in which the supposed trespass was committed was within the county of Cumberland; 3. Because the matters stated to have been by him, testified in the said trial do not appear by the indictment to have been and were not material to the issue then on trial.

Morton, attorney-general, for the commonwealth.

Mellen and Emery, for the defendant.

JACKSON, J. We do not think either of the first two objections to the indictment sufficient, on which to arrest the judgment. Every person who appears as a witness, and is duly sworn before a competent court on the trial of an issue there depending, is "lawfully required to depose the truth." It is not necessary that it should appear, in an indictment for perjury, whether the witness was compelled to attend by a subpoena, or whether he attended voluntarily; nor whether the false affirmation was made in answer to a specific question put to him, or in the course of his own relation of the facts. In either case he is equally required by law to depose the truth.

As to the jurisdiction of the justice before whom the oath was taken, it is averred in the indictment that an issue was duly joined in his court, and came on to be tried before him in due form of law; and that he had competent authority to administer the oath in question. The only objection is, that it is not distinctly averred that the land mentioned in that suit before the justice was within his county. But such an averment is not necessary nor usual. When it is said that an issue was joined "in a certain plea of trespass on the case upon promises," etc., or "in a certain plea of trespass and assault," it is never added that the promises were made, or the assault committed within the jurisdiction of the court.

The third objection appears to us fatal. As it is not averred that the facts, respecting which the defendant testified, were material on the trial, we cannot consider them so, unless they clearly appear to be material from the other facts set forth in the indictment. It is stated that the defendant in the suit referred to, produced two witnesses to swear that Knight cut down the tree in question; but it is not stated that they testified to that fact, nor even that they were sworn on the trial. The whole averment, therefore, respecting those two witnesses, may be considered as struck out of the indictment. It has no bearing or effect whatever on the case. There is nothing else in the indictment, from which we can infer that the fact testified by the defendant, Knight, was material on the trial.

Judgment arrested.

This case is relied on in *Commonwealth v. Pollard*, 12 Met. 229, and in *Commonwealth v. Byron*, 14 Gray, 32, to show that the materiality of the facts sworn to, should expressly appear from the indictment for perjury. And in

Commonwealth v. Smith, 11 Allen, 254, citing this case, Hoar, J., says: "It is not essential that the interrogatory propounded to the witness should be set forth in the indictment, unless it is necessary to make the answer which he gives intelligible. It is not even requisite that any specific interrogatory should be put to him since the perjury may be committed in the course of his own relation of the facts."

JEWETT v. WARREN.

[12 Mass. 300.]

SALE WITHOUT ACTUAL DELIVERY.—A sale of goods without an actual delivery to or possession by the vendee of the goods, will vest the property in the vendee as against the administrator of the vendor, if the property be of such a nature and in such a situation that a personal possession is impracticable. Thus, a sale of logs lying in a boom, which were shown to the vendee, was held to be effectual to transfer the right of property.

CONSIDERATION OF PLEDGE.—A liability for another for a contract still in force, is a sufficient consideration for a mortgage or pledge; and the ratio of the consideration to the value of the thing pledged is of no importance.

TROVER for a quantity of logs, submitted on the following statement of facts: William Jewett executed a bill of parcels of the logs, to the plaintiff, in consideration of his having become surety for William to the Kennebec Bank in the sum of one thousand three hundred and fifty dollars, which the plaintiff was liable to pay at the time the bill of parcels was made. This bill was witnessed by one Towle, who, at William's request to deliver the logs to plaintiff, showed them to him, they being then rafted at a mill in a boom. William died the next day, and the defendant took out administration on his estate, which was insolvent, and inventoried the logs as part of the deceased's estate, sawing some thereof into board, after the commencement of this action. When the appraisers were taking the value of the logs, the plaintiff showed to defendant the bill of parcels, but made no demand therefor. At the time of executing the bill of parcels, it was the understanding of the parties that plaintiff should refund the surplus, in case the logs should produce more than sufficient to protect him from his liability. It appeared that no part of the money for which the plaintiff was liable had been paid by him, or by the defendant, or his intestate; but plaintiff's property had been attached in an action commenced for the recovery thereof. The plaintiff never exercised any particular care in the safe-keeping of the logs which remained in the boom, nor did he employ any person to see to their preservation; but the defendant took care of them,

employing persons at his own expense to attend to them; and by this means they were preserved, as otherwise a part of them would probably have been lost.

Warren, for the plaintiff.

Wilde, contra.

By Court, PARKER, C. J. The objections made to the plaintiff's title to the logs, which are the subject of this suit, deserve consideration. It is said in the first place, that the transfer attempted by William Jewett to the plaintiff cannot be viewed as a mortgage or pledge of the logs, as security to the plaintiff for his liability upon said William's note to the bank; because there was no actual delivery to, or possession by, the plaintiff of the thing pledged, under the bill of parcels exhibited in the case; because also the parties intended the transfer should be absolute, and cannot now consider it conditional, to avoid the consequences of an absolute sale under such circumstances; and because, also, there was no consideration for the transfer, there being no absolute debt due from said William to the plaintiff.

But neither of these objections is, in our opinion, sufficiently maintained. There was all the delivery which could have been usefully made of property of this nature. A person was appointed by the vendor to deliver the logs lying within a boom, who went within sight of them with the vendee, and showed them to him. This was as effectual, for such kind of property as a delivery over in hand of a chattel capable of such personal possession. There was no necessity afterwards, that the vendee should place a person over the logs to take care of them for him. He did as others do with similar property; suffered it to lie within a boom until he should have occasion to use it; and when the defendant claimed the logs, as belonging to the estate of his intestate, the plaintiff exhibited his bill of parcels, and declared them to be his property. Nor will the acts of care or ownership exercised by the defendant as administrator, vary the case, for it was his duty to protect from waste and accident property belonging to the estate, which had been pledged for a sum less than its value; as he might eventually have to administer upon this very property.

As to the intent of the parties to make this transfer pass for absolute, although really conditional, we see no facts from which a jury would presume or which can in law be construed to have that effect. The bill of parcels is in the usual form practiced

with regard to merchandise actually sold. But it does not necessarily follow that the parties intended to give the transaction that appearance. If they did, they showed but little skill in their contrivance. The logs are estimated at several hundred dollars more than the note on which the plaintiff was liable, and the receipt on the bill shows the consideration to have been the plaintiff's liability only upon a note of hand in the bank. It would be impossible to set this up as an absolute sale under these circumstances, and especially as the parties called a witness to whom the real estate of the transaction was communicated, and discovered no disposition to conceal anything. With respect to the consideration whatever objections might lie, considering this as an absolute sale, on account of the contingency of the plaintiff's obligation to pay anything, or the difference between it and the value of the logs, these objections vanish when the transfer is viewed as a pledge. For a liability to pay on a contract in force is a sufficient consideration for the mortgage or pledge, and the ratio of the consideration to the value of the thing pledged is of no importance.

With regard to the objection of fraud, this has been answered in the foregoing observations, and upon the whole, it is the opinion of the court that the plaintiff is entitled to judgment.

As to constructive delivery this case is cited in *Carter v. Willard*, 19 Pick. 6; and as to the admission of parol evidence to show a sale absolute in its terms was intended as a pledge, this case is referred to in *Newton v. Fay*, 10 Allen, 507.

BARTLET v. HARLOW.

[12 MASS. 347.]

LEVY UPON JOINT ESTATE.—An execution against one holding lands in joint-tenancy or tenancy in common, cannot be levied upon part of such lands by metes and bounds.

PETITION for a partition of a certain tract of land, of which petitioner claims to be seised in fee, as tenant in common with the respondent. It was agreed that the respondent, Nathaniel Harlow, and Levi Harlow had been seised of the tract as tenants in common, and that the petitioner claimed under an execution issued in his favor against Levi and levied upon a moiety of said tract, describing the same by metes and bounds. A verdict was taken for the petitioner, subject to the opinion of

this court, whether an execution so levied upon a part of a tract held in common was valid.

Eddy, for the petitioner.

Thomas and Davis, *contra*.

By Court, JACKSON, J. By our statute of executions, Stat. 1783, c. 58, the creditor, if he thinks proper, may levy his execution on the real estate of his debtor, which shall be set off to him by metes and bounds; and if it is held in joint-tenancy, in coparcenary or tenancy in common, the execution may be extended on the "real estate held as aforesaid, or part thereof, describing the same with as much precision as the nature and situation thereof will admit." It is contended by the counsel for the petitioner, that the officer and the appraisers, in pursuance of this statute, may set off all the debtor's interest and estate in a part of the land held in common, and that although a levy on the part of his interest in the whole land would be good, yet they are not confined to this mode. On the other side, it is contended that the statute speaks of levying in such a case on part of the estate and not on part of the land; and that any construction contrary to the plain import of the words, would be highly injurious to the other co-tenants. To this it may be added that in the following section of the same statute it is said, that "when the real estate extended upon cannot be divided and set out by metes and bounds, as before described, or by the description before mentioned, then execution shall be extended upon the rents of such real estate;" making a plain distinction between the two modes of levying before mentioned, and showing that the description contemplated in case of a joint tenancy, etc., was not a description of the lands by metes and bounds.

This view of the language used by the legislature would lead us to adopt the construction of the respondent's counsel, and we are confirmed in this opinion by a more general view of the object of the statute and of the consequences that would result from a different construction. The levy of an execution upon real estate is a kind of statute conveyance from the debtor to the creditor. "It shall make as good a title to the creditor, his heirs and assigns, as the debtor has therein." Section 2. It was not the intention of the legislature to allow estates to be created or transferred in any new manner altogether repugnant to the principles of the common law; but to put a conveyance under this statute on as good a footing as if made freely by the debtor. And it is generally true that no estate or interest in

land can be transferred by such a levy, which the debtor might not have conveyed by any suitable instrument for a valuable consideration.

We are, then, to consider whether Levi Harlow, the debtor, could have conveyed by deed to the petitioner by metes and bounds, twenty acres, parcel of the sixty acres which he held in common with the respondent, so as to entitle the petitioner to maintain a writ or petition, for partition of the twenty acres against the respondent.

There is very little concerning this question to be found in the books. Among the numerous examples, in Co. Lit. and other books, of the severance of a joint tenancy, we find many instances of a conveyance by one joint tenant of a part of his estate, but not one unequivocal case of a conveyance of his estate in a part of the land. There is, indeed, one in Co. Lit. 193, which may possibly be so understood. He says: "If two joint tenants be of twenty acres, and one maketh a feoffment of his part in eighteen acres, the other cannot release" (namely, to his companion,) "his entire part, but only in two acres; for the jointure is severed for the residue." Lord Coke cites no case for this opinion; so that we have no opportunity to ascertain, by a recurrence to the facts, whether he contemplated a conveyance of the co-tenant's part in eighteen specific acres by metes and bounds, or in eighteen twentieths of the land. If the latter be understood, it will perfectly well comport with the context, and will illustrate the general doctrine for which the case is introduced, as well as if it be intended of a specific portion of land. And it is observable that Lord Coke uses like words in another place where it is plain that he intends an undivided portion of the estate, and not a specific parcel of the land: Hawk. Coke's L. T. 241; Fitz. N. B. 9 k. He says, if two joint tenants, or tenants in common, are disseised, and one releases all his right in the moiety, he shall be barred of his right in the whole; "but if he releases all his right which he has in the one acre, this shall bar him of his moiety in that acre only; and yet the moiety of two acres is one acre." Here it is obvious that if in the latter case we understand one acre described by metes and bounds, there is no analogy between the two cases; and the expression at the close "that the moiety of two acres is one acre," is wholly misplaced and without meaning. Nor could it ever have been supposed that a release of his right in one specific part would bar him of his right in the other part.

There is one other case on this point, which is transcribed by

Viner from Brownlow's Reports, 157: Vin. Ab., tit. Partition, S. pl. 15. A manor was conveyed, one moiety to one man in fee, and the other moiety to twelve others in fee. The twelve made a feoffment to J. S. of twelve several tenements and land, and J. S. made twelve several feoffments to those twelve. The thirteenth man, who had the other moiety, brought one writ of partition against them all, pretending that they held *insimul et pro indiviso*, and, by the opinion of the whole court, it would not lie; but he ought to have brought several writs. Brownlow, in the place cited, is stating different points relative to the writ of partition, apparently taken from different cases which he had heard or read. He mentions no name or date of the case in question, nor any other particulars from which we might learn whether there was anything peculiar in the circumstances, or whether the point now in question was considered by the court. A single case thus loosely reported is entitled to very little consideration when it appears to be in any degree inconsistent with the general principles of the law applicable to the subject.

On the other hand, it has been decided by this court in the case of *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22], that one joint-tenant cannot convey any specific part of the land to a stranger; at least not so as to prejudice his co-tenant. It is, indeed, intimated in that case that such a conveyance may operate by way of estoppel against the grantor. But this would not aid the petitioner in the present state of the case now under consideration.

In 2 Co. 68, and Cro. Eliz. 808, it is laid down as a general principle, that one joint-tenant cannot prejudice his companion in estate, or as to any matter of inheritance or freehold; although as to the profits of the freehold, as the receipt of rent, etc., the acts of one may prejudice the other. But it would, in many cases, tend to the prejudice and even to the destruction of the interest of one co-tenant, if the other might convey to a stranger his moiety in several distinct parcels of the land. The owner of a moiety of a farm thus circumstanced, instead of one piece of land conveniently situated for cultivation, would, on a partition, be compelled to take, perhaps, ten or twenty different parcels, interspersed over the whole tract, and separated by parts allotted to the several grantees. Suppose that two men hold jointly, or in common, land in a town sufficient only for two house lots, and that one of them could convey to ten persons his share in as many different portions of the land; or that so many executions could be thus levied on his share; the other

original co-tenant would, on a partition, be compelled to take ten different lots or parcels not adjoining to each other, and each too small for any useful purpose, instead of one house lot, to which he was originally entitled, as against the grantor: See *Toker's case*, 10 Co. 68.

If it be said that this is a necessary incident to his estate, which he must be supposed to have contemplated when he took it, it may be more justly said in answer, that the restraint contended for, by which one is prevented from conveying distinct portions of the land, is a necessary incident to the estate; and that as each was originally entitled to one moiety, for quantity and quality, to be assigned to him by commissioners or by a jury in due course of law, neither of them shall, by his own act, control the commissioners or jurors, and prevent their assigning to his companion such portion and in such manner as they, in the exercise of a sound discretion, would have thought just and proper. As the co-tenant had not originally any such right or authority in himself to control the proceedings on a partition, so neither can he transfer such a right to any assignees or grantees of his share.

It may be added, that if one co-tenant has this right the others of course have the same. Suppose, then, that three or more persons hold in common a township of wild land, and that each of them, without regard to the others, should divide the whole into such lots as he thought proper, and sell his share in each lot to different purchasers. As the lines of the lots, thus arbitrarily designated by the different owners, would perhaps in no instance coincide, it is easy to see that a partition among the several grantees would become extremely difficult and inconvenient; and if we imagine a like case, with a greater number of original owners, and, consequently, a greater diversity in the boundaries of the lots so conveyed, a partition would become, perhaps, utterly impossible.

Whilst the right of one co-tenant to alienate any distinct portion of the land might, as we have seen, be extremely injurious to his companions, the restraint on such alienations can seldom, if ever, prejudice the grantor. Suppose one of two co-tenants of forty acres wishes to sell ten acres, he may convey one undivided fourth part of the whole, and his grantee may, by legal process, have his share set off to him. This process of partition would be equally necessary, if the conveyance had been of a moiety of twenty acres taken out of the forty. There is, therefore, no additional trouble or expense, and the only differ-

ence is, that the grantor is prevented from selecting any particular portion of the whole tract, out of which his grantee shall take his share, which is a right he could never claim or exercise in his own behalf, while he continued the owner of the whole moiety. We are, therefore, satisfied that the petitioner cannot have partition as prayed for in this case.

It does not, however, follow that the levy of his execution is wholly void and fruitless. If the respondent should ever have his moiety duly set off to him in severalty, and if the part so assigned to him should not include that which was taken on the execution of the petitioner, we see no reason why the latter may not then hold what has thus been taken on his execution, as there will be no person interested or authorized to question his title, excepting Levi Harlow, who would probably be estopped by the levy of the execution as he would be by any other conveyance made by himself. Neither does it follow that the petitioner is not now entitled to a just proportion of the rents and profits of the land, if they can be taken in such a manner as not to infringe the right of the respondent to his share, nor to disturb him in the enjoyment of an undivided moiety of the whole land. But, as these points are not before us, it is unnecessary further to consider them.

The verdict returned in this case is to be set aside, and a verdict entered for the respondent, upon which judgment is to be rendered.

The rule established in this case is cited and adopted in many subsequent adjudications in this state: *Blasing v. Standard*, 17 Mass. 235; *Blossom v. Brightman*, 21 Pick. 284; *Peabody v. Minat*, 24 Id. 332; *Brown v. Bailey*, 1 Met. 257; *Adam v. Briggs' Iron Co.*, 7 Cush. 369; *Gibbs v. Swift*, 12 Id. 398; *Silleasey v. Brown*, 12 Allen, 36.

STRONG v. WILLIAMS.

[12 Mass. 300.]

BEQUEST TO CREDITOR.—A bequest to a creditor upon a bond for a sum of money less than the amount of the bond, together with certain specific articles, with a devise over of the residue of the property after payment of debts and legacies, will not operate as a satisfaction of the bond debt.

DEBT upon a bond made to plaintiff by the defendant's testator, Little, conditioned to pay plaintiff two hundred dollars within one month after her marriage, should such an event take place in the obligor's life-time, or that his heir, executors, etc.,

should pay her three hundred dollars and thirty-three cents, within six months after his decease. On the day after making the bond, the testator made a written promise to pay plaintiff, then a resident of his family as housekeeper, the sum of twenty dollars a month so long as she should remain with them, and furnish her with food and clothing. Plaintiff received such annuity for six years, and maintenance until the testator's decease, thirteen years from the date of the promise. By the will, the testator devised to the plaintiff, in consideration of long, faithful and meritorious services to him and his wife, then deceased, specific articles to the amount of seven hundred and forty-five dollars and eighty-four cents, three hundred dollars in cash, and the rent of the homestead for six months, valued at fifty dollars; and the residue of his estate was devised to charitable purposes. The estate was estimated as worth about three thousand three hundred and forty-six dollars and sixty-six cents. The testator left no issue. The question raised was whether these bequests in the will, all of which the plaintiff had received, operated to bar her recovery on the bond. The case was submitted on an agreed statement of facts.

Ashmun, for the plaintiff.

Noble, *contra*.

By Court, PUTNAM, J. The general rule anciently established in chancery was, that when a testator being indebted gave to his creditor a legacy equal to or exceeding the amount of his debt, the legacy should be considered as a satisfaction for the debt. The rule has been acknowledged in later cases, but with marks of disapprobation, and a disposition to restrain its operation in all cases where, from circumstances to be collected from the will, it might be inferred that the testator had a different intention: *Haynes v. Mico*, 1 Bro. C. C. 131. Thus where a testator left a sufficient estate, it was determined that he was to be presumed to have been kind as well as just. So if the legacy was of a less sum than the debt, or of a different nature, or upon conditions, or not equally beneficial in some one particular, although more so in another.

All the cases agree that the intention of the testator ought to prevail; and that, *prima facie* at least, whatever is given in a will is to be intended as a bounty. But by later cases, the courts have not been disposed to understand the testator as meaning to pay a debt, when he declares that he makes a gift;

unless the circumstances of the case should lead to a different conclusion.

Thus in the case cited for the plaintiff, *Brown v. Dawson*, 2 Vern. 498, where the wife joined in the sale of her jointure, and the husband gave her a note of seven pounds ten shillings per annum for her life, and afterwards, upon another such sale, he gave her a bond for six pounds ten shillings per annum for her life, and he afterwards made his will, and gave her fourteen pounds per annum for life, the legacy was adjudged to be a satisfaction for the note and bond. Here it will be perceived that the annuity given in the will amounted exactly to the sums secured by the bond and note; and the presumption of satisfaction proceeded upon the similitude of the legacy to the debt: 3 Fonb. 330 *in notis*. So in the case of *Fowler v. Fowler*, 3 P. Wms. 353, the general rule was applied. There the husband being indebted to the wife for arrears due by the marriage settlement, gave her a larger legacy by the will, and it was held a satisfaction of the debt. But it is to be observed that Lord Chancellor Talbot expressed great dissatisfaction with the rule; and it does not appear that any circumstances could be found to take the case out of its general application. In that case the court refused parol evidence to prove that the testator intended both should be paid.

But cases of this nature must depend upon the circumstances, and there must be a strong presumption to induce a belief that the testator intended the legacy as a payment, and not as a bounty: 2 Fonb. 332. Thus where the testatrix had given her servant a bond for twenty pounds, free of taxes, for her life, and afterwards made her will and gave the servant twenty pounds per annum, payable half yearly, but said nothing about the taxes, the court held that both should be paid: *Atkinson v. Webb*, 2 Vern. 478. Here the legacy, being not quite so beneficial as the debt, did not raise a presumption that it was intended as a payment. So, where the testator having sufficient assets, and having manifested great kindness for the legatee, gave a legacy of a greater amount than he owed, it was holden by Lord Chancellor Cowper that the testator might be presumed to be kind as well as just; and he decreed the payment of the legacy as well as the debt: *Cuthbert v. Peacock*, 1 Salk. 155. It has been holden, that a legacy for a less sum than the debt shall never be taken as satisfaction: 1 Salk. 508; and that specific things devised are never to be considered as satisfaction of a

debt, unless so expressed: 2 Eq. C. Ab., tit. *Devises*, pl. 21; Bac. Ab. *Legacies*, D.

So the circumstance, where the testator had devised "that all his debts and legacies should be paid," was holden sufficient to take the case out of the general rule; as where the testator, indebted to his maid-servant one hundred pounds by bond for wages, afterwards gave her five hundred pounds, Lord Chancellor King decreed that both should be paid, and as the testator had made provision for the payment of his debts: 1 P. Wms. 408, 409, *vide* note. So where it appeared, that the legatee had lived with the testatrix as a servant for twenty or thirty years, and she had given her bond for two hundred and sixty pounds, and in one month afterwards she made her will and gave her five hundred pounds; and in another clause she gave the rest of her servants five pounds a piece, but not to Jane Greese, the legatee, "because," said the testatrix, "I have done well for her before;" and she also made provision for her debts and legacies. Lord Hardwicke thought the circumstances above stated took the case out of the general rule and decreed the legacy to be no satisfaction for the debt: *Richardson v. Greese*, 3 Atk. 65; *Nichols v. Judson*, 2 Id. 301; *Clarke v. Sewall*, 3 Id. 97. So, where the testator was indebted for goods on an open account, a legacy for a larger sum was not held a satisfaction, because he might not know whether he was indebted or not, and therefore no presumption was to arise that he intended merely to pay a debt: 1 P. Wms. 299; *Powell's case*, 10 Mod. 201.

In the case at bar, the consideration for the legacy appears from the will to have been for the services of the legatee. A presumption that the legacy was intended to be a satisfaction of the bond, also, must rest on the fact that the bond was given for the same services; of which fact there is no evidence before us. It may have been for a different cause. We can only presume that it was for a lawful one. It appears also, from the will, that the testator intended his debts and legacies should be paid, before his residuary legatees should take anything. The pecuniary legacy to the plaintiff, also, is not so much as the debt; and, therefore, cannot be considered as a payment of it. Neither is there any declaration of the testator that the specific articles given should be considered as a satisfaction of the debt. It appears, also, that there are sufficient assets.

From a consideration of the principles and decisions applicable to the case, we are, therefore, all of opinion that the plaintiff ought to recover.

Defendant defaulted.

Chief Justice Gray, in passing upon the case then before the court, *Allen v. Merwin*, 121 Mass. 390, says: "This case falls within the well-settled rule, that a legacy exactly corresponding in amount and time of payment to an existing debt of the testator to the legatee, and given by a will which contains no provision indicating a different intention, is to be presumed to be in satisfaction of the debt, and not in addition thereto," and cites the principal case in support of that doctrine.

As to a bequest to a debtor, see *Rickets v. Livingston*, 1 Am. Dec. 158.

WOODBRIDGE v. BRIGHAM.

[13 MASS. 402.]

EXCLUDING DAY OF DATE.—If a note is made payable a certain number of days after date, the day of date is to be excluded in the computation.

NOTE PAYABLE AT BANK.—Where a note is made payable at a specified bank, no further demand on the maker is necessary in order to charge the indorsers.

ASSUMPSIT by the indorsees against the indorsers of a negotiable promissory note, bearing date at Hartford, December 31, 1812, and payable in ninety days after date, at the Hartford Bank. It appeared in evidence that the makers stopped payment on the twenty-fifth of March, 1813. On the first of April, 1813, an agent of the plaintiffs presented the note to one of the makers at Northampton for payment, and upon refusal notified the defendants who lived in the same town, on the same day of such demand and refusal, and gave notice that the holders would look to them for payment. Pursuant to the charge that the demand and notice were made too late, the jury found for the defendants. Motion for a new trial.

Mills, for the plaintiffs.

Ashmun and Bates, contra.

PARKER, C. J. Excluding the day of the date of the note declared on in this case from the computation of the ninety days, in which it was payable, it became due on the thirty-first of March, 1813. It was decided in the case of *Henry v. Jones*, 8 Mass. 453, cited in the argument, and the decision has ever since been adhered to that a demand must be made on the promisor on the day the note becomes due, or diligence shown to make the demand; and immediate notice of the failure to pay must be given to the indorser, or he will not be held liable. Where the indorser lives in the same town with the promisor he ought to be notified on the same day on which the demand

is made. The defendants in the case at bar were so notified. So that the only question is, whether the demand was seasonable. But that having been made on the first day of April instead of the thirty-first of March, it was insufficient to charge the indorsers, provided a personal demand on the promisors or an attempt to make it, was necessary in the present case.

The note was payable at the Hartford Bank, and the contract of the indorsers was that the promisors should appear there on the day appointed for payment, and take up the note, if the proper officers of the bank should be there ready to receive the money. Now it was determined in the case of *The Berkshire Bank v. Jones*, 6 Mass. 524 [4 Am. Dec. 175], which was also cited in the argument, that no demand or attempt to make one of the promisor, is necessary in such case to charge the indorser; it being sufficient that the officers were ready to receive the money. The promisors also had the right to refuse to make payment anywhere but at the Hartford Bank, where they might have provided funds to meet their engagements. It is doubtful, therefore, to say the least whether a demand upon them at Northampton on the thirty-first of March, would have been a legal demand, so as to bind the indorsers. For on that day the note ought to have been at the bank; and had the promisors been there on that day, and tendered the amount of their note, such a tender might have been pleaded in bar of any action against them.

As, therefore, no demand upon the promisors at Northampton was necessary in order to make the indorsers liable, the true question is, whether after the failure of the promisors to make the payment at the bank according to their contract, seasonable notice of this failure was given to the indorsers. Northampton being a full day's journey from Hartford, and as the note might have lain in the bank the whole of the thirty-first of March, in expectation of its being paid, the notice on the next day was as early as it was practicable to give it to the indorsers. Under these circumstances, this note being payable at a specified time and place, we think the case does not come within the rule laid down in *Henry v. Jones*, and that there ought to be a new trial, with leave to amend the declaration, if that should be necessary, upon payment of costs.

New trial granted.

VARNUM v. ABBOT.

[12 MASS. 474.]

CONVEYANCE BY JOINT-TENANT.—Although a conveyance by one joint-tenant or tenant in common of a part of the land, by metes and bounds, to a stranger, whether the conveyance be by deed or by levy of an execution, can have no legal effect to the prejudice of a co-tenant; yet such a conveyance will operate as an estoppel against the grantor and those claiming under him.

Writ of entry. The case was submitted upon an agreed statement containing the following facts: On the ninth of March, 1809, Eliphalet Fox and Elizabeth, his wife, were jointly seised of an undivided three-fourth part of the premises in fee, and Peter Fox, their son, was seised in common with them of the residue. In April, 1809, Eliphalet and Peter mortgaged to Daniel Abbot, one of the tenants, five acres of the premises in fee. In July, 1809, Eliphalet and Peter mortgaged the premises to the demandant, under which instrument he claims title in this action. Elizabeth survived her husband and died in 1812, leaving Peter, and Charles and I. R. Fox, the two other tenants herein, with eight other children, her heirs at law. The tenants pleaded severally as to several parts of the demanded premises, of which they were severally seised and disclaimed as to the residue. Peter's undivided fourth part had been levied on under executions in favor of Coburn and Wood, but as they are not made parties it is not necessary to set forth their interest more particularly.

Hoar, for the demandant.

Stearns, for the tenants.

JACKSON, J. Since the argument of this cause at the last term, we have had occasion to consider the general question which it involves, although presented in a different aspect, in the case of *Bartlet v. Harlow*, lately decided at Plymouth [*ante*, 76.] In that case it was determined that a conveyance by one joint-tenant or tenant in common, of a part of the land by metes and bounds to a stranger, whether the conveyance be by deed or by the levy of an execution, can have no legal effect or operation to the prejudice of a co-tenant. As the grantor himself has no right, on a partition, to select any particular portion of the land and insist to have his moiety, or any part of it, set off in that specific portion, so he cannot convey such a right to his grantee.

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We are now to consider whether such a conveyance has any

effect as against the grantor and those claiming under him. This point seems to have been left undecided in the case of *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22], where it is intimated that such a conveyance may possibly operate to this effect by way of estoppel. The court also in the case of *Bartlet v. Harlow*, avoided giving an express opinion on this point, it not being necessary in that case. On the fullest consideration, we are now satisfied that the conveyance may operate to this effect, without prejudice to the co-tenant and without violating any principle of law. We see no difference in this respect between a conveyance by deed and by the levy or extent of an execution. The former owner is estopped by the record of a judgment against him, and of the execution and return of it, as effectually as he would be by a deed under his own seal.

Suppose that after such a conveyance the other co-tenant has his moiety set off to him on a petition or writ of partition, and that his share is so assigned as not to include any part of what was so conveyed by his fellow; it is obvious that he can no longer object to this conveyance. He has got all that he was entitled to, and has not now any interest in the part so conveyed. There is, then, no one who can dispute the title of the grantee, unless it be the former owner. But why should he be permitted to say that nothing passed by his deed, or by the levy of the execution against him? He was in possession of the premises at the time of the conveyance, and he parted with that possession for a valuable and adequate consideration. There is no fraud, no oppression, nor injustice of any kind in the transaction, as it regards him. In the one case, he receives a price agreed on by himself. In the other, the price is fixed by disinterested men under oath, with a right on his part to redeem within a limited time if the appraised value is too low, which gives the effect of a voluntary bargain and sale by him. The only objection which ever existed to the conveyance, arose from the injury it might do his co-tenant; but this objection is not competent for him to make. The law may allow the whole effect of this objection without rendering the conveyance entirely void. Yet, unless the conveyance is merely void, the grantor would, under these circumstances, be estopped to dispute its operation.

There are many cases in which conveyances and other transactions are void and ineffectual to some purposes, or as they regard certain particular persons, which yet are valid and effectual in other respects. This is the case with fraudulent conveyances

made to defeat creditors; and with conveyances of land not acknowledged and recorded pursuant to the statute. It is, therefore, as unnecessary as it would be unjust, that this rule of law, which is intended to prevent one co-tenant from making a conveyance to the prejudice of his fellow, should enable him to defeat a stranger to whom he had conveyed, for a valuable consideration, or a creditor who had taken the land in discharge of his debt.

Instead of the case last put, let us suppose that, after such a conveyance by one co-tenant, the other should convey or release to the grantee his moiety in the same parcel of land. Each of the former owners would now be estopped by their respective deeds from disputing the title of the grantee. As to all strangers, his possession alone would be sufficient; and thus his title would, in effect, be indefeasible. Yet, if the first conveyance were merely void, it could not help or fortify the second, which would, therefore, be likewise void; and thus a party in actual possession, with a deed of conveyance from each of the two persons who alone had any pretense of title to the land, would still be unable to maintain the possession. So, if one co-tenant of twenty acres should sell to a stranger his moiety in ten acres by metes and bounds, and afterwards to the same person the moiety of the remaining ten acres in like manner; if the first conveyance is void, the second will be also void. Yet, in such a case there is no reason of justice or policy, which should prevent the grantee from holding an undivided moiety of the whole twenty acres.

Upon any other construction of such conveyances, great inconveniences would follow. Two or more joint-tenants or tenants in common could never convey any specific portion of the land, unless they joined in the same deed. But one may be willing to sell with general warranty, while another will give only a quitclaim. So each may be willing to warrant his specific share; but they may refuse to join in a deed with covenants of warranty, lest they should be mutually bound for each other. So, if one of the part-owners be absent and not known to exist—a case which has sometimes happened in the division of an intestate's estate among his heirs—it would be highly unjust and absurd that his return should wholly avoid such a conveyance made by the others in his absence. It is just that he should not be prejudiced by it. But there is no reason why the other co-tenants should by this accident be enabled to avoid their own contracts, and to reclaim land which they had fairly sold for a valuable consideration.

It then being clear that a conveyance by one joint-tenant or tenant in common of his share in a certain specific portion of the land is not absolutely void, we are to see what is the effect of the several conveyances set forth in this statement of facts. And first we may throw out of the case all the conveyances by Eliphalet Fox, the father, whether of part or the whole. He was joint-tenant with his wife, Elizabeth Fox, who survived him; and it has been decided, in a case arising out of this same estate and title, that no conveyance by him could bind her after his decease, and that she took the whole survivorship: *For v. Fletcher*, 8 Mass. 274. The demandant, therefore, can hold nothing under Eliphalet Fox; and the three fourths part which belonged to him and his wife descended, on her death, to her children and heirs. She left eleven children, two of whom, Charles and Stephen R. Fox, are sued as tenants in this action; and each of whom took one eleventh part of her three fourths, or three undivided forty-fourth parts of the whole. As it is said in the statement of facts that these tenants are severally seised of certain parts of the demanded premises, and they have respectively disclaimed as to the residue, we must suppose that there has been a partition among the heirs, upon which the several parts now defended by these two tenants were assigned to them respectively as heirs of their mother. In this view of the case, it is obvious that the demandant cannot recover against either of those two tenants.

As to the undivided fourth part, formerly owned by Peter Fox, it appears that he had conveyed the whole of it, in different portions, by deeds and executions which have a priority to the demandant's title. Only one of these conveyances is now in question, namely, the mortgage made to Abbot, as the other two grantees, Wood and Coburn, are not sued in this action. According to the principles before mentioned, the mortgage made to Abbot of five acres, in April, 1809, is good against Peter Fox and all who claim under him. The demandant who claims under a subsequent conveyance from the said Peter is estopped to deny this title of Abbot; and the consequence is, according to the agreement of the parties, that he must become nonsuit.

We cannot here avoid remarking the irregularity of the proceedings in this suit. It appears that the three persons who are here sued hold each of them in severally three different parcels of the premises. Two or more persons so situated cannot be joined as tenants in one writ of entry. The gist of every

such action is the supposed unlawful entry of the tenant or of the person under whom he claims; and the object of the suit is to disprove the title of the tenant, by showing its unlawful commencement. But the proof of an unlawful entry by one has no tendency, in the case supposed, to prove the same point as to another; their titles have no necessary connection; and it is, in effect, trying two or more distinct titles in one writ.

So one of the tenants himself may be a disseisor, and the other may hold by alienation from a disseisor. But the demandant cannot have a writ against one as a disseisor and against the other in the *per*. On the other hand, if a man is disseised by two or more persons, the disseisors have one joint estate, and one title; the entry of all of them is one act, and the disseisee must, in such a case, sue them all jointly. So if one disseisor conveys the whole to two or more jointly, they must all be sued together. But where two persons hold in severalty distinct parcels under conveyances from the same disseisor; or where they have themselves severally disseised the demandant of distinct parcels, it would be as irregular to join them in the suit, as to join two trespassers who had each committed a trespass at different times, and on different portions of the plaintiff's land; or two debtors who had each given his own bond to the plaintiff for different debts. The parties having, however, agreed that the demandant shall become nonsuit, if he is not entitled to recover against either of the tenants, this irregularity will not materially affect the result; as we are of opinion that he cannot recover against either.

Demandant nonsuited.

See the case of *Bartlet v. Harlow*, *ante*, 76, and the cases in the note thereto, where the principle of this decision is approved.

POMEROY v. WINSHIP.

[12 MASS. 518.]

ENTRY TO SUPPORT FORECLOSURE. — When the mortgagee enters on the mortgaged premises before condition broken, he may commence his foreclosure without any new entry by declaring that he holds for condition broken, after that event shall have occurred; if he make no such declaration, the mortgagor may elect to consider him in as claiming to foreclose, by bringing his bill of equity at any time within the statutory period, after a tender of performance according to the terms of the mortgage.

DESCRIPTION OF FORECLOSED LAND. — In the sheriff's notice of the sale of the equity of redemption, a general description of the property is sufficient.

SALE UPON CREDIT.—The giving a reasonable time to the purchaser of such equity of redemption, to examine the title before the delivery of the deed, is not a sale upon credit.

BILL in equity against Abiel Winship, brought by the assignee of an equity of redemption to redeem certain mortgaged premises. The case appears from the opinion.

Prescott and Ward, for the plaintiff.

Bigelow and W. Sullivan, *contra*.

By Court, PARKER, C. J. The points which have been argued in the case are: 1. That the plaintiff's bill cannot be sustained, because he has not shown that the defendant to whom the mortgage made to Brown had been assigned, has ever entered upon the mortgaged premises for condition broken; and, 2. That the proceedings of the sheriff, antecedent to and at the sale were defective, so that no title passed to the plaintiff by the deed of the sheriff.

With respect to the first point the facts are, that Jonathan Winship, the judgment-debtor, having, on the fifth of March, 1798, conveyed the premises in mortgage to Samuel Brown, to secure the payment of seven thousand dollars, and interest, in one year from the time of the execution of the deed, Brown, on the fifteenth of September, 1805, the condition of the deed being broken, but no entry having been made by him therefor, assigned all his right and interest in the premises to the defendant, who paid him, as a consideration thereof, the sum due, and interest. The defendant, assignee of the mortgage, had been in possession, claiming to hold in his own right, from the sixth of March, 1798; but did not make a new entry for condition broken, when he became assignee for the mortgage; nor has he at any time since made any express declarations, that he continued the possession for that cause. So that he now contends, that this process cannot be maintained against him, because the statute which gives to this court jurisdiction as a court of equity on the subject of mortgages, confines that jurisdiction to cases where a foreclosure is attempted by an entry upon the land for a breach of the condition.

The statute, 1785, c. 22, sec. 2, being intended for the relief of persons having equitable rights, which cannot be forced by action at law, ought not to be restricted in its operation, so as not to reach the object which the legislature had in view when it was enacted. That object was, to restore to mortgagors and those holding under them, the title and possession of lands

mortgaged, on payment or tender of the money due, and interest at any time within three years after actual possession taken by the mortgagee or his assigns, for the purpose of acquiring to themselves an indefeasible title to an estate, which was liable to be defeated. The benefit intended to be secured was for the mortgagor, and not for the mortgagee; that an estate originally conveyed on condition, as a pledge for a debt, after it had become absolute in strict law by non-performance of the condition within the stipulated time, might retain its original character of a pledge for a longer time than the contract expressed, namely, for three years after the mortgagee had determined to avail himself of the breach of condition, and to make the estate absolute in himself and his heirs. The statute ought to be so construed as to effectuate this intention, and not to increase the difficulty of the mortgagor, or to aid a mortgagee in keeping possession of an estate, after his debtor should be ready and willing to pay him the money which it was conveyed to secure, unless the redemption has been foreclosed in the manner described by law.

It has been adjudged, *Hills v. Payson*, 1 Mass. 559, that an action at common law, or by statute, does not lie for the mortgagor to recover possession, on tender of performance of the condition after the same has been broken, although the equity of redemption may be open, no entry having been made by the mortgagee. The remedy in such case must be in equity, or perhaps by resisting the entry of the mortgagee when he shall attempt to foreclose by a suit, by showing actual payment of the debt secured by the mortgage. If the mortgagee, therefore, should have entered and dispossessed the mortgagor before condition broken, which he may do by law, and hold over after condition broken, without making any declaration of his intention to foreclose, there is no remedy for the mortgagor, unless under the statute giving equitable jurisdiction to this court: Stat. 1798, c. 77. And if the words of the statute are to be taken strictly, it is obvious that the mortgagee might thus defeat the right of redemption intended to be secured by the statute; and, at his election, convert a conditional into an absolute estate, in spite of the legislative provisions to the contrary. To obviate this manifest inconvenience and absurdity, the court will support the rights of the mortgagor as far as they can without violating any principles of law. It has already been decided, that when the mortgagee shall enter after condition broken, it shall be presumed that he entered for that cause, and the time

for that foreclosure shall run from that entry. It has, also, been decided, that where there has been an entry before the breach, the mortgagee may commence his foreclosure without any new entry, by declaring that he holds for condition broken, when that event shall occur: *Newall v. Wright*, 3 Mass. 138 [3 Am. Dec. 98].

These are reasonable decisions for the benefit of the mortgagee, that he may not be put to the unnecessary inconvenience of a new entry or a suit upon his mortgage, when he has already got possession of the estate. It seems to be a correlative principle, that, where the mortgagee is in, the condition being broken, the mortgagor, to secure his rights may elect to consider him in as claiming to foreclose; and that a tender of performance, made to him when thus in possession, shall avail to the mortgagor as much as if there had been a public entry or a judgment for possession, because the condition was not performed. This doctrine puts the parties to the deed upon an equal footing, giving to the one a right to foreclose, as by his contract he had a right to claim an absolute estate; and to the other, a right to redeem within three years, from any period after condition broken, when he shall choose to consider the grantee as claiming to hold the estate without condition.

It is more especially necessary that this doctrine, with respect to the interest of parties to a mortgage, should prevail here, where the usage is almost universal for the mortgagor to remain in possession until the time for performance of the condition has expired, without a covenant in the deed to that effect; and where, nevertheless, the mortgagee has, by law, the right to possession immediately after the delivery of the deed. For the mortgagee may sometimes gain possession, contrary to the real understanding of the parties; and if he should choose to continue, without any act showing his intention to foreclose, the mortgagor would be deprived of his right of redeeming, unless he has the right to consider him in for condition broken, when that event has actually taken place.

In the case before us, the defendant had entered upon the premises the day after the execution of the mortgage to Brown, namely, the sixth of March, 1798. He has been in possession from that time until the present, and in 1805, he purchased an assignment of Brown's mortgage, the condition of which had been long before broken; having made no new entry at the time, nor declaration of his intention to hold on account of the breach of the condition. It is immaterial whether he entered

under a deed from the mortgagee, or as a disseisor; for it ought not, in either case, to be in his power to prevent the creditors of the mortgagor from availing themselves of the equity of redemption. If he entered by deed, that deed might have been made for the very purpose of extinguishing the right of redemption, to the prejudice of the creditors. If he entered as a disseisor, it would be still more extraordinary that he could procure to himself an absolute estate under a mortgage, merely because, having obtained a wrongful seisin, he should choose not to avail himself of his right to foreclose the mortgage.

He must, therefore, in the present stage of this controversy, be considered as in under the assignment of the mortgage; and the mortgagor, or his lawful assigns, have a right to consider him as holding under the mortgage deed, with a view to claim an absolute estate under it, the condition having been broken when he took the assignment. And it is in the election of the mortgagor, at any time, at least within twenty years, to claim his right to redeem, by bringing his bill in equity, after tender of performance according to the condition of the deed. The mortgagee suffers nothing by this; because he may hasten the foreclosure by a declaration of the purpose for which he holds, and he is completely indemnified before any judgment against him for redemption can be entered. We are satisfied, therefore, that the case made out by the plaintiff is completely within the statute, and that the objection made by the defendant cannot prevail.

The next objection relates to the proceedings of the sheriff, antecedent to and attending the sale of the equity. By the preamble to the deed, and the return of the sheriff upon the execution, everything appears to have been done which the law requires to make such a sale valid. There was a seizure of the equity, a notification of the time and place of sale within the time prescribed, and notice given to the judgment-debtor. By the return it also appears that the plaintiff was the highest bidder, and that the purchase-money was paid down; so that the sheriff became immediately answerable to the judgment-creditor for the amount of his debt, and to the debtor for the residue.

But it is contended that the return of the sheriff is not conclusive, and that the defendant has a right to go behind it, and require proof of all the acts which, by the statute, are essential to the validity of the title. Whether this right exists or not, need not now be decided, as we are all of the opinion that

enough has been shown to justify the return of the officer and his declarations in the deed. The principal difficulty suggested on this point is, that in the public notice given of the intended sale, the description of the thing to be sold was defective. That description was, "the right in equity of redeeming the messuage and farm situate in Brighton, in the county of Middlesex, on which Jonathan Winship now lives." It is insisted that the several parcels of which the farm consisted should have been mentioned, as also the nature and amount of the incumbrance.

But we think this objection not maintained. The statute requires only that there be an advertisement before the sale, without requiring any particulars. It is in the power of the debtor to appear, at the time and place of sale, and represent precisely the situation of the estate and the state of the title. The purchaser will require a specification at the time, and the sheriff is then bound to make public what he knows upon the subject. If the price should be low for want of sufficient knowledge of the circumstances attending the property, the creditor is injured, not the debtor, for he has time to redeem; if it should be high, the purchaser may be injured, but not the debtor or the creditor. At all events the mortgagee cannot suffer in either case, for the effect of the sale is to pay him his debt. The present defendant, therefore, viewed in the light of a mortgagee, has no interest in this question; and it is doubtful whether in that character he can ever dispute the title of the assignee of the mortgagor, certainly not without notice and request from the mortgagor, who may dispute the assignment.

Another objection much insisted upon is, that the sale was conditional and upon credit, and therefore void. The testimony of the sheriff upon this subject is, that he gave eighty-four days to the purchaser to look into the title and to satisfy himself of his safety in purchasing. The sale was in no other respect conditional, than that if, upon examination, there should be reasonable doubts of the title, it should in that case be void. This condition, if it had not been expressed, would have been implied. For if, after the vendue and before the deed was delivered, and the purchaser should have hesitated and taken time to look up the title, he might have withdrawn from the bargain, if any substantial defect had appeared. As to credit, none was given; but the money was to be paid upon delivery of the deed, which was to be done at the expiration of the eighty-four days. This time perhaps would have been unreasonable had not a

cloud been thrown over the title by the advertisement of the defendant himself, in which he declared himself to be the owner of the whole estate, in fee-simple, and which was by him inserted in the public papers previous to the vendue. He has no right to complain of the delay, nor indeed has it been prejudicial to any of the parties concerned. If another creditor had interposed and taken the equity, or had any one made a *bona fide* purchase of it from the judgment-debtor, between the day of the sale and the delivery of the deed, the question as to the effect of the time might be more important.

Nor do we think that, as between these parties, the objection arising from the statute of frauds is maintained. Admitting that a sheriff's sale of an equity is within that statute, yet the effect of it would be only to enable either party to the contract to refuse being bound by it. If pursuant to the contract a deed is given, the bargain is consummated and the previous contract is out of the question. The case of *Jackson v. Callin*, 2 Johns. 248, [8 Am. Dec. 415], cited for the defendant, goes no further than this. The sheriff there made his sale in July and executed his deed in the following November, which was delivered as an escrow. The purchaser having failed to show that the condition on which the deed was to be delivered was performed, endeavored to maintain his title by the sale without a deed. It was held that the sale was void, because there was no memorandum in writing, and that it was not helped by the deed afterwards, which had never become effectual.

Upon the whole, we see no reason why the plaintiff is not entitled to redeem, provided he tendered a sufficient sum; and if the defendant has no better title than under the mortgage. But the defendant has produced a deed from the mortgagor, executed long before the equity was attached, which purports to be a valid conveyance of all the mortgagor's right in the land. This deed is impeached as fraudulent, and this has given rise to another objection to our further proceeding in this cause, which requires some consideration.

It is contended that as the defendant claims title to the premises under a deed from the mortgagor, purporting to be *bona fide*, and for a valuable consideration, the jurisdiction of this court under the statute, although maintainable upon every other ground, ceases, because it is not competent to the court to inquire into the validity of the deed or to avoid it on the ground of fraud, that being a fact which can be tried only by a jury; and that this court has no power under the statute giving them

equitable jurisdiction to order a trial by jury. If this objection be valid, the statute provision for proceedings in equity on subjects of this nature would be nugatory. For in any case fraud may be suggested, and it would be in the power of the parties, by introducing it, to oust the jurisdiction of the court. If the defendant had not claimed to hold under the deed, but had suffered the cause to proceed solely upon the questions relating to the mortgage, it might be doubtful whether a decree in this case would conclude him against showing a legal title on a suit brought by him at common law, founded on this conveyance. But as he has chosen to set forth his deed in his answer, as a reason why the plaintiff should not be permitted to redeem, it is necessary that the court should have proof of the execution of the deed, and also of its genuineness, if suspicions should arise from the circumstances of its execution and delivery. This of necessity lets in the other party to controvert it, and the court must determine from the facts proved whether anything passed by it to the supposed grantee or not.

This inquiry might be made by the court without the intervention of a jury. If, by the principles of the constitution, the party may insist upon a jury, this will only prove that one ought to be impaneled here to try the fact. But, when the party himself submits his title to the court under this process, he may be considered as waiving any right to a trial by jury, and so would have no cause to complain. But it has been insisted that, even if the court were inclined to have the verdict of a jury upon the validity of this deed, they have no authority to order such a trial, because the statute makes no provision for the exercise of such authority.

We cannot conceive that the power of the court is so unreasonably limited. When the statute, creating this jurisdiction, authorized the court to proceed and determine according to equity and good conscience, it was undoubtedly intended that they should proceed, as to the subject-matter of their jurisdiction, in the same manner as courts of a similar jurisdiction proceed in England, to whose laws and forms of trials all our statute provisions are referable, when no particular provision for the mode of trial is enacted. Now, the courts of chancery in England have immemorially exercised the power of directing an issue, and sending it to a common law court to be tried, whenever any material facts are strongly controverted, and they believe a trial by jury is expedient. This mode of proceeding may be pursued much more conveniently here than there. For

the chancery power of this court being merely incidental, a jury is always at hand, and with very little additional expense to the parties, the court may avail itself of its powers, as a court of law, in aid of its chancery jurisdiction. Indeed, the trial of a question of fact by jury with us, in a cause pending on the equity side of the court, will amount to nothing more, in point of authority, than the appointment of auditors; a mode of inquiry which is frequently resorted to for the convenience of the court and of the parties.

It being understood that the deed, under which the defendant claims to hold the premises, is to be impeached by the plaintiff on the ground of fraud, the court order that a jury be impaneled to try this question; and all further proceedings upon the bill will be suspended until a verdict shall be returned.

See Gross v. Kemp, post.

BARTLET v. KING.

[12 MASS. 536.]

BEQUEST TO CHARITABLE USES.—A bequest to promote the propagation of Christianity among the heathen is not void as against public policy. Nor is such bequest void because there is no court in this commonwealth to compel the execution of the trust; nor for the reason that it was made during the last illness of the testator.

UNCERTAINTY AVOIDING BEQUEST.—A bequest in trust for charitable uses, to certain persons who, at the time of the execution of the will, constituted a voluntary association, is not void for uncertainty, but is available for the individuals then composing such association, but not to their successors.

REPEAL BY SUBSEQUENT STATUTE.—A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, will operate to repeal the former statute, although no express words to that effect are used.

DEBT against the executor of the will of Mary Norris to recover a legacy bequeathed to plaintiffs, as follows: "I give and bequeath to William Bartlet of, etc.; Samuel Spring of, etc.; and Samuel Worcester of, etc., and to the survivors and survivor of of them, and the executors, administrators and assigns of such survivor, the capital sum of thirty thousand dollars, to have and to hold the same upon the special trust and confidence here following: that is to say, that they and every of them shall and will permit the persons who now constitute The American Board of Commissioners for Foreign Missions (so called) and their

associates, to take and receive the interest and income of the same capital sum, for the purposes of the said board, and to promote the pious objects thereof; and, further, that they, the said Bartlet, etc., and the survivors and survivor of them, and the executor, etc., shall and will, upon request, manage, dispose of, invest, transfer and assign the same capital sum, in such manner as the said persons, who constitute the said American Board of Commissioners for Foreign Missions (so called) and their associates, or the committee or trustees of said board, duly authorized, shall direct and require." Verdict for the plaintiff, upon the general issue, subject to the opinion of this court upon an agreed statement containing the following facts:

In Massachusetts various associations of congregational ministers exist; many of these send delegates to an annual meeting which is called a general association; and this association chooses annually at such meeting nine persons, who are denominated The American Board of Commissioners for Foreign Missions. Such board was in existence and known to the testatrix at the time of making her will. The testatrix died on the evening of the day upon which the will was made, she having given deliberate directions to the scrivener on that day as to the items. The will was duly proved, and the executor has sufficient assets to pay all the debts, legacies and charges against the estate.

Otis and Prescott, for the plaintiffs.

Dexter and Merrill, contra.

By Court, DEWEY, J. The action is for a legacy given by the will of Mary Norris, deceased, to the plaintiffs, in trust for the American Board of Commissioners for Foreign Missions, for the purpose of promoting the pious objects of said board. The proceedings are according to the course of the common law, and the action is given by statute. The clause of the will on which the action is founded is in the words following. [His honor then recited the words of the bequest.] As there is no objection to the competency of the plaintiffs to take, and the words of the will are sufficient to vest the legacy legally in them, they are entitled to retain their verdict, unless the bequest is void for some of the reasons suggested by the counsel for the defendant.

The objections are: 1. That it is against public policy; 2. That it is void for uncertainty as to the object of the legacy, and of the persons who were intended to be the *cestuis que trust*; 3. That a trust in this commonwealth is ineffectual, there being

no court to compel the execution of it; and, 4. That as a bequest for pious and charitable uses, it is void by the provincial act of 28 Geo. II., which enacts that all such bequests or devises, which shall not be made before the last sickness of the person making the same, or at least three months before the death of the testator, shall be utterly void and of no effect.

Whether the avails of this legacy might be more beneficially employed for similar purposes in our own country than in foreign parts, is not a point for us to decide. The testatrix, in the disposition of her property, had a right to direct the manner in which it should be applied; and if not inconsistent with the rules of law, her intention must be executed. In applying it to the purposes mentioned in the will, her intention was certainly humane and benevolent. The propagation of the Christian religion, whether among our own citizens or the people of any other nation, is an object of the highest concern, and can not be opposed to any general rule of law or principle of public policy.

The second point made by the defendant's counsel is, that the bequest is void for uncertainty. This is the principal question in the cause, and it has been fully and ingeniously argued by the counsel on both sides, and a great variety of cases have been cited which bear on the case: 2 Bro. C. C. 188; *Thomas v. Thomas*, 6 T. R. 67; 3 Ves. jun. 402; 7 T. R. 138; Plowd. 25; *Roberts on Wills*, 231; 1 W. Bl. 91; 9 Mass. 419; *Id.* 294. Without undertaking to comment on the numerous authorities referred to, I shall give the opinion of the court as to what clearly appears to be the result of them as applicable to this part of the case.

It is very manifest that the legacy is not given to the plaintiffs for their own use and benefit, but in trust for the use of others; and it is said on the part of the defendant that the trust, or the persons who are entitled to the benefit of it as *cestuis que trust*, are altogether uncertain. If this be so, the bequest is undoubtedly void; for it was not the intention of the testatrix that the plaintiffs should hold it for their own use. It then becomes necessary to inquire who are the persons to whose use the plaintiffs claim the legacy under the will of the testatrix? They are not described by their proper names, nor by the name of any corporate body; but they are called "The American Board of Commissioners for Foreign Missions and their Associates." The persons who at the time of executing the will constituted that board, and their associates, if they can be ascertained, are

the persons for whose use the legacy was intended; not for their personal or individual benefit, but as trustees to apply the proceeds of it to the purposes of the board, and to promote the pious objects for which it was established.

It is not necessary that a legatee be named in the will. If he is otherwise clearly described, it is sufficient: 2 P. Wms. 141; Powell on Devises, 837. Cases of this sort very frequently occur; as where a legacy is given to the children of a particular person, or to the wife, or to any other relative who is clearly designated; and in various other instances, where a description of the person is substituted for the name. If the persons who constituted "The American Board of Foreign Mission," are certain, and known by that description, we then have as much certainty with regard to the persons to whom the plaintiffs are to pay over the interest and income of the legacy, as if they had been expressly named in the will. For this we must recur to the facts agreed by the parties; and by them it is admitted that such a board consisting of nine persons was in being and known to the testatrix at the time of making her will; and that the members of the board are annually chosen by the general association of congregational ministers in Massachusetts proper. But, as the members of the board are elected annually, it is still said that they are uncertain, and incompetent to take under this bequest, and that it is also uncertain who were intended by the word associates; that it must either include all the ministers of the various associations in Massachusetts, or the delegates to the association, either of which will be too vague and uncertain.

The first part of the objection is answered by a recurrence to the words of the will. The persons who then, at the time of making the will, constituted the board, are the persons designated to receive the amount of the legacy; and any subsequent change of the members of the board cannot affect the validity of the bequest. We do not see any propriety in giving to the word associates the meaning which the defendant's counsel has affixed to it; nor do we think that the testator intended it should be so understood. It is difficult to find, in the manner in which it is here used, that it has any meaning; and if it has not, or is absurd, or repugnant to the clear intention of the testatrix manifested in other parts of the will, it may be rejected as surplusage: 3 Ves. jun. 320; 2 Ves. 564. At most it is only an inaccuracy in the description of the persons, who are, nevertheless, sufficiently certain, and which does not go to defeat the

legacy: 1 Vea. jun. 266; 2 P. Wms. 141; 2 Ves. jun. 580. Rejecting then the word associates, as mere surplusage, and considering the members of the board of commissioners, at the time of making the will, as the persons intended by the testatrix, all difficulty with respect to the uncertainty of the persons who stand in the relation of *cestuis que trust* of the plaintiffs is removed.

As the board of commissioners do not, however, take the legacy to their own personal use and benefit, but are to apply the income of it to charitable and pious uses, it is said in the argument that they are not to be considered as the *cestuis que trust*, who are still more uncertain, they being the various persons in foreign countries, who it was intended should receive the benefit of the religious instruction furnished by the bounty of the testatrix. In donations to trustees for the support of schools, or other charitable purposes, it does not seem to be necessary that there should be any particular or certain persons designated, who are strictly *cestuis que trust* in the common use of the term. By the will, in this case, The American Board of Commissioners for Foreign Missions are made to stand in that relation to the plaintiffs. They are to receive the income of the legacy, and apply it to the pious and charitable purposes of the board, in furnishing the means of religious instruction, according to the rules of their association. In trusts of this nature, individuals who are ultimately to be benefited are always uncertain. All the certainty required is, a general description or limitation, not a particular description of the individuals. On this ground, therefore, we do not perceive any more difficulty in giving effect to the bequest, than exists in all cases of donations to charitable uses, whether given to trustees directly, or in trust for other trustees, to be expended in promoting the objects for which they are given.

The object of the bequest is to promote the knowledge of christianity among the heathen in foreign countries, by sending out missionaries to preach to them and instruct them. The ultimate object of the bequest, and the persons for whose benefit it was intended, are not more indefinite than they are in a great number of cases to be found in the books, in which the trusts have been adjudged to be good. A bequest in trust for the advancement of the Christian religion among the infidels in North America: 3 Bro. C. B. 171; a trust for the benefit of poor clergymen: Id. 517; to a lying-in hospital: Id. 12; to the poor inhabitants of St. Leonard: Amb. 422; to poor dissenting minis-

ters in any country: *Id.* 524. In all these, and many other similar cases, it has been determined that the trusts were effectual and valid.

In the case of *Thelusson v. Woodford*, 4 Ves. jun. 329, it is said that the court is bound to carry the will into effect, if they can see a general intention consistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal. Powell, in his treatise on Devises, p. 421, says that a devise is never construed absolutely void for uncertainty, but from necessity; if it be possible to reduce it to a certainty, the devise is good. And he cites the case of *Ongley v. Peale*, 2 Ld. Raym. 1312, in support of the position. In the case of *Christ's Church College, Cambridge*, 1 W. Bl. 90, it is adopted as a principle, on which that case was determined, that the court of chancery will aid a defective conveyance to legal charitable uses. On these grounds we are satisfied that there is not much uncertainty as to the persons who are to take this legacy, as the *cestuis que trust* of the plaintiffs, or as to the ultimate object of the bequest, as to render the bequest on that account void. But, according to the principles adopted in the English courts we are clearly of opinion that the trust is well created by the will, and that it is valid and effectual.

But it is further contended on the part of the defendant, that such a bequest must be void in this commonwealth, because we have no court of chancery to enforce the execution of a trust. We do not think it necessary for the court in this case to inquire what is the remedy, or whether there be any, in case the trustees should be unfaithful in the discharge of their trust. This legacy is given to the plaintiffs on the special trust and confidence expressed in the bequest, and confiding in their integrity that they will dispose of the proceeds of it according to the directions of the testatrix, and in pursuance of her pious and benevolent intentions. They are persons competent to take as legatees, and the legacy is legally vested in them. It is not for a court of law to divest a legal estate, because there may be at some future time a failure in the execution of an equitable trust, for which it is uncertain whether there be any adequate remedy.

In the argument many instances were referred to by the counsel for the plaintiffs, in which the legislature of the commonwealth, by granting acts of incorporation, has lent its aid to carry into more effectual execution trusts designed for charitable uses, and for other objects beneficial to the public; and

it was contended on the part of the plaintiffs that the legislature in some cases of that description may lawfully exercise the powers of a court of chancery. But it is unnecessary to give any opinion as to the legal effects of such legislative acts; as the decision of this case will not be affected by any consideration of that question. It has undoubtedly been a practice as well under the colonial charters as since the adoption of the present constitution, for the legislature to create corporations, and to invest them with certain powers, to enable them better to manage donations to charitable and other public uses. And as such trusts in England are under the particular care of the king as *parens patriæ*, and are regulated by the chancellor who is called the keeper of the king's conscience; in the absence of a court of chancery in this commonwealth, there seems to be good reason for the legislature to give such beneficial aid to charitable trusts, when it does not interfere with the just and equitable rights of individuals.

It is also contended for the defendant that this legacy is within the provincial statute of 28 Geo. II., commonly called the statute of mortmain, and therefore void. But we think this objection cannot prevail. All the provisions and restrictions contained in that act manifestly related to gifts and devises, made to such bodies politic as were created by the act itself, which were Episcopal and other Protestant churches. Donations or bequests to any other persons or corporate bodies cannot by any reasonable construction be brought within the meaning of the act. It is not, however, very material now to settle the construction of that statute; as we are fully satisfied that it is virtually repealed by the subsequent statute of 1785, c. 51. A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law as well as in reason and common sense, operate to repeal the former; according to the case of *The King v. Cator*, 4 Burr. 2026, in which it was decided that a former statute, inflicting a penalty of one hundred pounds and three month's imprisonment, on persons enticing away artificers, was virtually repealed by a subsequent statute, inflicting five hundred pounds penalty and twelve months' imprisonment for the same offense. The same principle was adopted in the case of *The King v. Davis*, 1 Leach's Cas. 306. All the subject-matter of the act of 28 Geo. II. is contained in the statute of 1785. A part only of its restrictions and limitations, in the second

section, is omitted in the latter, and it is very obvious by comparing them that the legislature considered the latter as a complete substitute and repeal of the former.

It being clearly the opinion of those members of the court who sit in this cause, that none of the objections which have been made are sufficient to defeat the bequest of the plaintiffs; according to the agreement of the parties judgment is to be entered according to the verdict.

JACKSON and PUTNAM, JJ., having been of counsel, did not sit in this cause.

Upon the correctness of the position here taken as to the effect of a subsequent statute revising the subject-matter of a former one, see citations in *Nichols v. Squire*, 5 Pick. 169; *Commonwealth v. Cooley*, 10 Id. 39; and in *Lefevre v. Lefevre*, 59 N. Y. 446. As to the validity of a bequest to charitable uses this case is recognized as authority in many adjudications, in *Kingsbury v. Gould*, 9 Met. 282; *Solier v. St. Paul's Church*, 12 Id. 259, where the principal case is called "the leading case" upon this subject: *Earle v. Wood*, 8 Oush. 445; *Odell v. Odell*, 10 Allen, 6; *Drury v. Natick*, Id. 181; as to the want of chancery jurisdiction not affecting the validity of such a bequest when sufficient in form, see *Jackson v. Phillips*, 14 Allen, 553, 556, 559, 576; *Fairbanks v. Lamson*, 99 Mass. 533; *Fellows v. Miner*, 119 Id. 544.

BLANCHARD v. RUSSELL.

[13 MASS. 1.]

DISCHARGE UNDER FOREIGN BANKRUPT LAW.—A discharge under a bankrupt law of the state in which a contract was made, and of which the debtor was a citizen, is a good bar to an action upon such contract in the state in which the creditor resides.

STATE INSOLVENT LAWS.—In the absence of a national bankrupt system the several states have power to pass local insolvent laws.

ASSUMPT for money had and received. The cause was submitted upon an agreed statement containing the following material facts:

On the twenty-second of April, 1811, Russell, at that time and ever since a merchant in the city of New York, was indebted to Blanchard, then and ever since a merchant in Boston, in the sum of one thousand four hundred seventy dollars and ninety-four cents, upon an account adjusted between them on that day for the proceeds of goods consigned by Blanchard to Russell, and sold by the latter at New York. Afterwards Russell became insolvent and, in pursuance of certain statutes of the state of New York, "for the benefit of insolvent debtors," etc., passed

April 3, 1811, made an assignment of his property for the benefit of his creditors, and applied for and, on the twenty-eighth of October, 1811, duly obtained his discharge as a bankrupt from all his debts and liabilities, etc. The plaintiff was not at the time the debt was contracted, nor hath been since, in the state of New York, and had no notice of the said assignment, or of any of the proceedings subsequent thereto, other than what he may be presumed to have had under the statutes aforesaid. He made no claim, and received no dividend of Russell's effects, and did no act approving or assenting to said proceedings. On the nineteenth day of June, 1813, the defendant Russell, being within this commonwealth, was arrested upon the original writ in this action.

Minot, for the plaintiff, cited *Bruce v. Bruce*, 2 Bos. and P. 229 note; *Thorn v. Watkins*, 2 Ves. 35; *Sill v. Worswick*, 1 H. Bl. 665; *Robinson v. Bland*, 1 W. Bl. 258; *Holman v. Johnson*, Cowp. 344; *Pearsall v. Dwight*, 2 Mass. 88 [3 Am. Dec. 35]; *Watson v. Bourne*, 10 Id. 335 [6 Am. Dec. 129]; *Cooper's Bank. Law App.* 29; *Proctor v. Moore*, 1 Mass. 198; *Baker v. Wheaton*, 5 Id. 509 [4 Am. Dec. 71]; *Van Raugh v. Van Arsdaln*, 3 Cai. 154 [2 Am. Dec. 259]; 2 Johns. 198, 238 [3 Am. Dec. 410]; 7 Id. 117 [5 Am. Dec. 249]; *Kirby*, 313; 2 Dall. 256; 3 Id. 369; *Goulden v. Prince*, U. S. Circ. C. Penn. Apr. term, 1814.

W. Sullivan, for the defendant.

By Court, PARKER, C. J. The proceedings under the insolvent act of the state of New York are admitted to have been regular, so that the question referred to us is, whether the plaintiff is barred of his suit on this demand under the circumstances disclosed in the statement of facts, the point being to be considered in the same light, as if the certificate of discharge had been regularly set forth in a plea in bar to the action, and an issue in law joined on the sufficiency of such plea.

The law, under which the defendant claims to be discharged, is a general law, intended to affect all the citizens of the state of New York at least, and it provides a system, by which an insolvent debtor may, upon his own application, or upon the petition of any of his creditors, be holden to surrender all his property, and be discharged from all his debts. It is therefore a bankrupt law, and to be distinguished from insolvent laws, technically so called. The question then put in a general form is, whether a discharge under a bankrupt law of any state can be effectually pleaded in bar of an action brought in another

state, of which the creditor is a citizen; the contract, which is sued, having been made within the state which enacted the law, the debtor being there a citizen and subject at the time of making it.

This is a question important in its nature and consequences, and has received the attention it deserves, having been argued in several parts of the commonwealth, in cases of a similar nature, which have arisen in the counties of Hampshire, Plymouth and Suffolk.

That the laws of any state cannot, by any inherent authority, be entitled to respect extritorially, or beyond the jurisdiction of the state which enacts them, is the necessary result of the independence of distinct sovereignties. But the courtesy, comity, or mutual convenience of nations, amongst which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts; so that it is now a principle generally received that contracts are to be construed and interpreted according to the laws of the state in which they are made, unless, from their tenor, it is perceived that they were entered into with a view to the laws of some other state. And nothing can be more just than this principle. For when a merchant of France, Holland, or England, enters into a contract in his own country, he must be presumed to be conversant of the laws of the place where he is, and to expect that his contract is to be judged of and carried into effect according to those laws; and the merchant with whom he deals, if a foreigner, must be supposed to submit himself to the same laws, unless he has taken care to stipulate for a performance in some other country, or has, in some other way, excepted his particular contract from the laws of the country where he is.

The rule does not apply, however, to the process by which a creditor shall attempt to enforce his demand in the courts of a state other than that in which the contract was made; for the remedy must be pursuant to the laws of the state where it is sought, otherwise great irregularity and confusion would be introduced into the form of judicial proceedings. These principles have been well discussed in several cases in this court in former periods; particularly in those of *Pearsall v. Dwight* [3 Am. Dec. 35], cited in the argument, and *Powers v. Lynch*, 4 Mass. 77.

This general rule, however, does not reach far enough to settle the question in this case; for it cannot easily be main-

tained that a law which authorizes the discharge of a contract upon terms different from those provided for in the contract itself, amounts to a construction or interpretation of it. Some other ground must, therefore, be resorted to; and we think it may be assumed, as a rule affecting all personal contracts, that they are subject to all the consequences attached to contracts of a similar nature by the laws of the country where they are made, if the contracting party is a subject of, or resident in, that country, where it is entered into, and no provision is introduced to refer it to the laws of any other country. Thus, if an American merchant becomes the creditor of an English merchant in England, either personally or by agent, and the English merchant becomes bankrupt, and obtains a certificate of discharge, the American merchant will be concluded by such certificate; for it is reasonable to suppose that both parties knew of the existence of the bankrupt laws of England, and the contract must be presumed to have been made with reference to those laws. Indeed, merchants doing business abroad are always supposed conversant of the laws of the place where they transact their business, and to submit themselves to such laws, and even to such customs, as are found there to exist.

But, as the laws of foreign countries are not admitted *ex proprio vigore*, but only *ex comitate*, the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction; for, if they should be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected. Thus, if any state should enact that its citizens should be discharged from all debts due to creditors living without the state, such a provision would be so contrary to the common principles of justice, that the most liberal spirit of comity would not require its adoption in any other state. So, if a state, under the pretense of establishing a general bankrupt law, should authorize such proceedings as would deprive all creditors, living out of the state, of an opportunity to share in the distribution of the effects of the debtor, such a law would have no effect beyond the territory of the state in which it was passed.

It has been said that personal contracts have no *situs* or locality, but that they follow the person of the creditor wherever he goes. The general position means nothing more than that such contracts may be enforced in any other country, and that the debtor may be arrested, or his property sequestered, to secure the debt, according to the laws of the country where the creditor shall seek his remedy. This is not inconsistent with

the other principle that the *lex loci* shall operate in the construction of the contract, and even in the dissolution of it.

There are not many authorities directly in point upon this question, even in England, where it was to be expected that cases of this kind would have frequently occurred. In every case, however, happening in that country, in which the effect of a foreign bankrupt law has been discussed, we find that the place where the contract was made has been the circumstance of principal consideration by the court.

In the case of *Ballantine v. Goulding*, 1 Cooke's Bank. L. 347, the *dictum* of Lord Mansfield is broad enough to terminate the controversy. He says: "What is a discharge in the country where the contract was made is a discharge everywhere." But it is unsafe to take these general propositions of judges, however eminent, as rules of decision; for it often happens that they are limited in their application, although not in their expression. The report of this case, also, is not sufficiently minute to authorize its reception as a conclusive precedent. And even this *dictum* leaves open the question whether a discharge will affect any creditors, but such as are resident in the country where it was obtained; for the position is: "What is a discharge in the country, etc., is a discharge everywhere."

The same doctrine, however, is recognized by Lord Ellenborough in a subsequent case, *Potter v. Brown*, 5 East, 124, which amounts almost, if not entirely, to a definitive settlement of the question in England; and the reasons there given are such as will justify us in coming to the same decision here.

In the case of *Smith v. Buchanan*, 1 East, 6, the plea of a discharge under an insolvent law of Maryland, was disallowed, because the debt sued was contracted in England, and the plaintiffs were English subjects and resident in England. The decision of this cause, if it had been put altogether upon the ground that it did not appear that the debt was contracted in Maryland, would have furnished pretty strong authority, although in negative terms, for the defense under the certificate in the case at bar. But, as another reason was coupled with that, namely, that the plaintiffs were English subjects, this case cannot be considered as having much influence upon the question, as it cannot be ascertained, from the report of the case, what influence was attributed to the *locus contractus*, and what to the residence of the contractor.

In the case, however, of *Potter v. Brown*, before referred to, the point seems distinctly decided. The plea in bar set forth

the bankrupt law of the United States, a surrender and regular discharge under it; and it contained an allegation that the demand upon which the action was brought originated within the state of Maryland; and it was further alleged, that the plaintiffs, being English subjects, had a house of trade in Baltimore, within the said state, and that one of the plaintiffs resided there, having charge of the said house. It was determined that this was a good bar, on the ground that the contract was discharged according to the laws of the place where it was made; and the general doctrine advanced by Lord Mansfield, in the case of *Ballantine v. Goulding*, was recognized and adopted, namely, "that a lawful discharge in the country where the contract was made, is a discharge everywhere." The facts stated in the plea relative to the residence of one of the plaintiffs, and the having a house of trade in Baltimore, do not appear to have been adverted to by the court or urged by the counsel in the argument; so that we must conclude that those circumstances had no influence upon the decision. This, however, is not an authoritative precedent in this court, although it undoubtedly has very great weight, as the deliberate opinion of very learned men, in a country where the principles of law are so well understood and so correctly applied in practice.

Upon examinations of the reports of judicial decisions of several of the state courts, we are not able to find any direct adjudication upon this question.

In Pennsylvania, they admit the operation of laws of other states, so far as to discharge from arrest or bail, debtors who have been discharged under those laws in the states where they reside, provided such states show the same comity towards them: *Smith v. Brown*, 3 Binn. 201. But no case has occurred there calculated to produce a decision as to the final effect of such a discharge upon the debt itself, the creditor living in a different state from that which passed the law.

In the state of New York the effect of insolvent laws of other states has frequently been discussed, upon applications to be discharged from bail, and otherwise. The uniform decision there has been that the discharge is not available against demands which did not originate in the state where the laws existed; and the opinion of the judges is very strongly intimated that such laws are confined in their operation to contracts which have an implied reference to those laws, being made under their jurisdiction: *Van Raugh v. Van Arsdaln*, 3 Cai. 154 [2 Am. Dec. 259]; 1 Dall. 229; *Millar v. Hall*, 2 Johns. 198; *Smith v. Spinola*, Id. 235; *Smith v. Smith*, 7 Id. 117.

The same inference may be drawn from the case of *Greenough v. Emery*, 3 Dall. 369, adjudged in the circuit court of the United States, within the state of Pennsylvania; the reason given for holding the plea of discharge, under an insolvent law of that state, bad, being that the contract against which it was pleaded was made in the state of Massachusetts.

In this state several cases have occurred which brought into view the insolvent laws of some of the other states; and although none of them presented the general question which is now before us, it has been contended that a different principle has been adopted from that which appears to have prevailed in England, and in the other states of the Union. Upon a critical investigation, however, of the several cases referred to, it will not appear that any definitive opinion has been adopted, although there have undoubtedly been expressions of some of the judges, which have the tendency suggested.

The first case is that of *Proctor v. Moore*, 1 Mass. 199. There a Connecticut debtor was sued in Massachusetts, by a creditor of the latter state. A discharge, under a resolve of the legislature of Connecticut, was pleaded in bar of the action; and it was holden to be no bar, because it did not appear by the plea that the contract was made in Connecticut, or that the plaintiff resided there. This is analogous to the decisions in New York, and in the circuit court of the United States, and also to the case of *Smith v. Buchanan*, in England, before cited. There is a strong intimation in all these cases that the place where the contract is made shall determine whether the discharge shall affect it or not. But still the stress apparently laid upon the domicile of the creditor leaves a doubt as to the decision of the general principle. Perhaps, however, a virtual residence of the creditor where the contract was made would be implied, or at least a virtual assent to the laws of the state.

The next case is that of *Baker v. Wheaton*, 5 Mass. 511 [4 Am. Dec. 71], upon a note made in Rhode Island, the promisor and promisee being both citizens of that state, and a discharge having been obtained by the promisor under its laws, before the note was indorsed to Baker, the plaintiff, who was a citizen of Massachusetts. The only point decided was that the discharge would avail against the indorsee as well as the promisee, because the note was dishonored at the time of its indorsement and before. A *dictum* of Parsons, C. J., is, however, much relied on by the plaintiff's counsel in this case. The words are: "If when the contract was made, the promisee had

not been a citizen of Rhode Island, he would not have been bound by the laws of it in any other state." This proposition, taken in an unlimited sense, is undoubtedly adverse to the position now taken by us. But, considering it with a proper reference to the case then before the court, we can perceive no repugnance.

The law under which the discharge was obtained was a special law, made after the existence of the contract against which it was pleaded; and it might well be held that none but citizens of the state could be liable to the effects of such a law. Indeed, it is difficult to perceive how a law, which directly impairs the obligation of contracts, can have any effect, even against the citizens of the state which enacts it, such a law being directly repugnant to an express provision of the constitution of the United States. Perhaps, however, the long established usage in the state of Rhode Island, of legislating upon each particular case of bankruptcy which occurs there, might place creditors dealing with Rhode Island debtors upon the same footing as they would be in regard to debtors of a state in which there should be a permanent bankrupt or insolvent law; but of this we give no opinion. Had there been in the state of Rhode Island a general, permanent system, by which all debtors, in case of misfortunes, might be relieved from their debts, and a contract had been made within that state during the existence of such a law, we apprehend a different opinion, as to the effect of a discharge under such a system, would have been adopted.

The next and last case which has arisen in this state, in which the insolvent laws of another state have been under consideration, is that of *Watson v. Bourne*, 10 Mass. 337 [6 Am. Dec. 129], and there is nothing in the case itself which necessarily required any opinion upon the question now before us. A contract which was not originally affected by the law, was sued within the state of Rhode Island, and had passed *in rem judicatam*; the question was, whether it had acquired any new locality, so as to be affected by a general discharge of the debtor, in pursuance of a law of that state, passed after the rendition of the judgment. In the opinion, however, delivered by the late Chief Justice Sewall, the following observation, if not restricted to the case immediately before him, would confine the operation of laws of this nature entirely to the limits of the state which passed them. His words are: "A discharge can only operate when the law is made by an authority common to the debtor and creditor in all respects, where both are citizens and subjects." But the very

generality of this expression proves that it was considered applicable only to the case immediately under consideration. For it cannot be supposed that the learned judge would have excluded from the operation of the acts of any particular state, contracts made within the state, and to be performed there, between parties resident there for the purpose of trade. And yet such parties may have been neither citizens nor subjects, except in a very limited sense; and not at all, until long after the enacting of the law.

The observations which have been made upon the *dictum* of Chief Justice Parsons in the case of *Baker v. Wheaton*, are applicable to the observation of Chief Justice Sewall in the last cited case. Both these learned judges spoke in reference to the particular acts of discharge by the legislature of Rhode Island, and not concerning a general bankrupt or insolvent law; none such existing in that state.

Finding, therefore, no decision of our own courts upon the subject before us, and being satisfied that the general cast of the authorities cited from the decided cases in England and some of the sister states is in favor of giving effect to such discharges, as to all contracts made within the state where they are authorized, we adopt this principle as the law relating to personal contracts.

But there is another general objection to the effect of the insolvent law, on which the defense in this case rests, which, if well maintained, will supersede all others. This is that it is void, as repugnant to the constitution of the United States. The argument in support of this objection has been divided into two branches; one founded on a clause of the eighth section of the first article of the constitution, which vests the power of making uniform laws on the subject of bankruptcy in congress; and the other upon the clause which prohibits the several states from passing any laws which shall impair the obligation of contracts.

With respect to the first branch, we are not of opinion that the power of the states to legislate upon that subject is taken away, merely because a general authority upon the subject is given to congress. The authority so given is to pass uniform laws on the subject of bankruptcy, and in order to give this provision full effect, there is no doubt that if an uniform law should be passed by congress, the respective acts of the several states would be superseded, because their existence would then be not only unnecessary but inconsistent with that uniformity

which it was the wish of the people to establish. Whether particular insolvent laws made in peculiar exigencies would fall within the reason of this objection, we do not undertake to decide.

At the time the constitution was framed and adopted, some of the states had insolvent laws and others had not, and probably where they existed there was a great diversity in their provisions and effects. The establishment, therefore, of a general and uniform system was undoubtedly desirable, and for that reason the power was given to congress. But it never could have been imagined that if congress did not choose to exercise the authority given them, the several existing laws were to become extinct, merely because there was a power to supersede them vested in another body.

Such an effect cannot be inferred, either from analogous expressions in the constitution, or from the practical construction of that instrument. For it is well known that several of the states had insolvent laws at the time of the adoption of the constitution, which continued in practical operation afterwards; some of them have passed laws of the kind since the actual administration under that constitution; and it does not appear that any exception has been taken, in the state courts or elsewhere, to the validity of those laws. Indeed, the words of the constitution themselves seem to imply the existence and continuance of local laws of this nature, until superseded by an exercise of the power vested in congress. The power given is not to make laws on the subject of bankruptcy, which, by construction, might amount to an assumption of the authority pre-existing in the state legislatures, but to make uniform laws, the obvious import of which is, that congress is to have the power of equalizing the effects of a system of bankruptcy over the whole united nation. Correspondent with this idea, we find that the congress which passed the bankrupt law of 1800, in the sixty-third section of that act, recognized and even provided for the continuance of the existing state insolvent laws.

It may be also observed that there is no clause in the constitution prohibitory of the exercise of this power by the several states, although such clauses are to be found in regard to other powers, which are given to the general government. For instance, power is given to lay and collect taxes, duties, imposts and excises. It cannot surely be contended, that because of this power, the states have ceased to enjoy the power of laying and collecting taxes. If such were the true construction of the

constitution the state governments would all have expired the moment the general government began to live. But the convention was aware of no such consequence. On the contrary, it supposed that there might be a concurrent power, and therefore took care expressly to prohibit the states from establishing imposts, or duties on imports and exports; leaving the states respectively to exercise the power of laying taxes of a different kind from imposts, and of establishing excises, as they had before done. Congress had power to declare war, to grant letters of marque and reprisal, to raise and support armies, to provide and maintain a navy, etc.; yet it was deemed necessary to prohibit the states from the exercise of these attributes of sovereignty. From which it may be clearly inferred that the mere giving of powers over certain objects to congress did not necessarily deprive the state legislatures of the same powers antecedently enjoyed by them, unless the exercise of those powers should interfere with the authority of the general government, in which case the power of the state must undoubtedly give place.

We are aware of the able and elaborate argument of Judge Washington on this subject in the case of *Goulden v. Prince* in the circuit court of the United States, referred to by the plaintiff's counsel; but, with all our respect for the reasoning of that learned judge, we cannot yield assent to his opinion. It seems to us that he overlooked the important circumstance that the state governments were in existence, with full legislative powers at the time when the constitution of the United States was made; and that whatever powers were not expressly and exclusively given by the people to the national government remained where they were before, namely, with the state legislative authority. The people resumed nothing from their legislatures but what they expressly gave to congress.

It would seem, in order to support the position contended for, that the state governments must be supposed to have been dissolved when the national constitution was submitted to the people; or, at most, that they continued provisionally only, until the national government had commenced its operation, and then that the state legislatures ceased to have powers upon any subjects which even potentially came within the purview of national authority. But we apprehend that each state had full dominion, within the limits of its constitution, over all subjects, which remained unimpaired, except so far as the people had expressly transferred part of the power to the general government.

The learned judge has instanced the subject of naturalization to enforce his construction of the constitution; and thinks it very clear that if congress had passed no uniform law on that subject, the several states would be prohibited from naturalizing foreigners, because the power to naturalize is given to congress. But we think it at least doubtful whether, if congress had provided no rule of naturalization, the states might not have still exercised the power which they were accustomed to use. For it can hardly be thought that a sovereign state which was desirous of replenishing its population by encouragement to foreign artisans or other valuable emigrants, had deprived itself of this privilege because it had given a power to congress, but which was never exercised, of establishing a general system upon the same subject. If the states should abuse the power, either of naturalization or of making bankrupt laws, the remedy is at all times in the hands of congress. Let them establish an uniform system, and the particular systems are at once overthrown. The power of naturalization, however, considering the effect of its exercise upon all the states of the union, may be essentially national, and for that reason not proper to be exercised by any individual branch of the nation.

A strong instance of the inconvenience of the doctrine contended for exists in another provision of the constitution. Congress has power to fix the standard of weights and measures throughout the United States; but they have not, to this day, exercised that power. Will it be pretended that the several state authorities have lost their power to fix such a standard within their respective jurisdictions? If they have, then, probably all the states have acted in open defiance to the constitution on this subject ever since it was adopted.

Probably, the correct exposition of the constitution on this point is, that in whatever cases power is given to congress, which was before enjoyed by the state governments, the same power may be exercised by the state legislatures, until congress shall have superseded the necessity by passing a general law; unless, by an express prohibition, the state is interdicted from the use of such power.

We are more satisfied with the reasoning of the learned judge, upon the other branch of the argument, which relates to impairing the obligation of contracts. A law which is in force when a contract is made, cannot be said to have that effect; for the contract, being made under the law, is presumed to be made with reference to it, and the parties are legally conversant of it

at the time. The contract, in such case, is not impaired by the law, for the law is a part of the contract. A law, made after the existence of a contract, which alters the terms of it by rendering it less beneficial to the creditor, or by defeating any of the terms which the parties had agreed upon, essentially impairs its obligation, and for aught we see, is a direct violation of the constitution of the United States: *Call v. Hagger*, 8 Mass. 423.

It has often been observed, by those who have advocated a bankrupt or insolvent law in the legislature of this commonwealth, with a view to the relief of an unfortunate class of debtors from existing embarrassments, that the object of the framers of the constitution, in this prohibition upon the states, was to prevent tender laws and other expedients of a like nature, which had been resorted to in some of the states, to the great prejudice of creditors; and that this article of the constitution ought to be construed with reference to such intention. But the words are too imperative to be evaded. "No state shall emit bills of credit, make anything but gold and silver a tender in payment of debts, pass any bill of attainder, or *ex post facto* law, or law impairing the force and obligation of contracts." It would be contrary to all rules of construction, to limit this latter clause of the prohibition to a subject which is expressly prohibited in a preceding sentence. Full operation ought to be given to the words of an instrument so deliberately and cautiously made as was the constitution of the United States.

There may be laws made, even after the execution of a contract, varying the remedies which before existed, which would not be liable to this objection. It has been contended in this case that the debt sued for arose before the law under which the discharge is claimed was passed. But this point is not satisfactorily made out. There was an account current between the parties prior to the third of April, 1811, when the insolvent law passed. But the account was not settled and the balance struck until the twenty-second of the same April; and we think the debt did not exist until that time. It is true the difference in point of time is small; but we cannot depart from the rule to suit the equity of the case. A law providing for the discharge of the debtor when the contract was formed, the contract must be held subject to that law, because it was made with an implied reference to it; and the discharge having been regularly obtained, it is a bar to the plaintiff's action.

Plaintiff nonsuited.

In *Bradford v. Farrand*, 13 Mass. 18, and *Walsh v. Farrand*, Id. 19, the doctrine of the principal case was affirmed and applied. In the former it was held that where a contract was made in Massachusetts, with a citizen of that state by a citizen of Pennsylvania, and there was no provision that it should be performed in Pennsylvania, it was held that a discharge of the debtor, under an insolvent law of the latter state, was no bar to an action in the former, upon such contract. In *Walsh v. Farrand*, it was held that where the parties to a contract were all citizens of another state, a discharge of the debtors under an insolvent law of such state, was a good bar to an action upon such contract.

In *Preston v. Savage*, 13 Mass. 21, a temporary insolvent law of a foreign country, by which debtors were released from all demands against them, on surrendering their effects for the benefit of their creditors, and the same effects were to be distributed only among such creditors as should apply within thirty days after public notice of such surrender, was held not to have intended to operate beyond the jurisdiction of the government where it was made, and to have no respect to such debts as might be due to persons living in other countries.

The doctrine of these cases is generally followed in this country: See note to *Smith v. Smith*, 3 Am. Dec. 410.

VINTON v. BRADFORD.

[13 Mass. 112.]

SUCCESSIVE ATTACHMENTS.—A deputy sheriff cannot make a valid attachment of chattels already attached by another deputy of the same sheriff, although the value may be more than sufficient to satisfy the first attachment.

ACTION on the case against the defendant as sheriff of the county of Suffolk, for the misfeasance of Luke Baldwin, one of his deputies. The declaration contained three counts, the substance of which is stated in the opinion. A nonsuit was directed at the trial on the ground of the insufficiency of the declaration, and a motion was made to set aside the nonsuit.

Thurston, for the plaintiff.

Townsend, for the defendant.

By Court, PARKER, C. J. The nonsuit in this case was ordered because the judge, at the trial, thought that the facts stated in the several counts of which the declaration consists, showed no cause of action. After an examination of all the counts, we are all of opinion that the nonsuit was properly rendered. The *gravamen* in each of them is the non-delivery of goods, or of the proceeds of them by Baldwin, a deputy sheriff to Billings, another deputy of the same sheriff, that he might apply them in satisfaction of an execution obtained by the plaintiff against

Selden Brainerd. In each of the counts it is alleged that Baldwin had the goods in his custody on a previous attachment made by him upon a writ in favor of Carnes and Rhodes; and it is alleged that, after satisfying the execution which issued in favor of these creditors, there was a surplus which Baldwin was bound to deliver over to Billings, he having returned upon the plaintiff's writ that he had attached the same goods; and it being further alleged that the attachment made by Billings was next in order of time to that which was made by Baldwin in favor of Carnes and Rhodes; and that Baldwin, unlawfully and to the prejudice of the plaintiff's rights, applied the surplus of the proceeds in satisfaction of an execution in favor of one Adams, for whom he had made an attachment in fact after the attachment made by Billings.

The great defect in the plaintiff's title to an action is, that by his own showing, when Billings undertook to return an attachment of the goods upon his writ, they had been previously attached, and were in the actual custody of Baldwin, upon another lawful process. What Billings returned upon the plaintiff's writ was therefore false in point of fact; for there could not be two subsisting attachments of the same goods, by two distinct deputy sheriffs; the term attachment necessarily implying the actual possession of the goods, which cannot be in both at the same time. One deputy sheriff having attached goods by virtue of one writ, may hold the same goods as attached upon other writs, which subsequently come into his hands for service: but another deputy sheriff cannot lawfully interfere, because he cannot disturb the possession previously acquired.

It has been determined in the case of *Lane v. Jackson*, 5 Mass. 157, and in the case of *Watson v. Todd*, Id. 271, that to constitute an attachment of chattels there must be an actual possession by the attaching officer; and that no other officer can lawfully interfere with that possession. But the plaintiff's counsel relies upon a *dictum* of Chief Justice Parsons in the latter case, that different deputies of the same sheriff are not different officers in contemplation of law, all the deputies being but servants of the sheriff, and their possession being his.

This position is undoubtedly true, but like all other general rules must admit of exceptions. The deputies, in relation to each other, must often be considered as several officers with distinct rights and acting with distinct liabilities. Upon the supposition that the possession of a deputy who has attached goods is the possession of his master, it will follow that after an

attachment has been made by a deputy, the sheriff himself, by receiving another writ, may cause the goods to be holden upon it, yet that no other deputy can do the same; for the possession of one deputy is not the possession of all or any other of the deputies. And to make good a second attachment by the sheriff himself, of chattels already attached by one of his deputies, it would undoubtedly be necessary that the sheriff should give notice to the deputy who holds them, of the writ put into his hands before any other writs should have come to the hands of the deputy.

It is clear, therefore, that Billings made no attachment, and consequently that the plaintiff has suffered nothing by the application of the surplus proceeds of the goods by Baldwin to the satisfaction of the execution in favor of Adams. Whether Baldwin committed a misfeasance in giving effect to Adam's writ, from the time it was put into the hands of his servant, when he himself was absent, is immaterial in the present action, because the plaintiff was not prejudiced thereby, as Baldwin had not undertaken to serve the plaintiff's writ, nor was it put into his hands for that purpose, but merely that he might complete the service by leaving a summons. Billings, relying upon his own supposed attachment, and having made his return accordingly. Whether Billings was bound when he found the goods already attached by Baldwin to put the writ into his hands, with a request to serve it upon the same goods, is a question between the plaintiff and Billings, or the sheriff as answerable for his deputies. The present action cannot be maintained and the nonsuit must stand.

Costs for the defendant.

This case is cited and the doctrine of it approved in the following decisions: *Bagley v. White*, 4 Pick. 397; *Wheeler v. Bacon*, 4 Gray, 551; *Robinson v. Ensign*, 6 Id. 302, 305; *Odiorne v. Colley*, 2 N. H. 66; *Walker v. Foxcroft*, 2 Maine, 270. In *Burroughs v. Wright*, 16 Vt. 619, in which the principal case was cited by counsel, the general rule that one officer cannot attach goods which are already in the custody of another officer upon a prior writ was recognized and followed. So in *West River Bank v. Gorham*, 38 Vt. 649; *Moore v. Graves*, 3 N. H. 406; *Beers v. Place*, 36 Conn. 578; *Strout v. Bradbury*, 5 Maine, 313; and *Oldham v. Scrivener*, 3 B. Monroe, 579; *Harbison v. McCortney*, 1 Grant, 174. See Drake on Attachment, secs. 267, 356. In *Odiorne v. Colley*, 2 N. H. 66, it was decided that where a deputy holding a prior writ of attachment, delivers the attached property to a third person, and such person assents to the doings of a second officer under another attachment, such assent does not cure the invalidity of the second attachment. In *Thompson v. Marsh*, 14 Mass. 269, the court held, following the doctrine of *Draper v. Arnold*, 12 Mass. 449, that deputy sheriffs are so far distinct and inde-

pendent officers that one may sue another in trover for attaching and removing property which the plaintiff holds under a prior attachment; and in the case of *Robinson v. Ensign*, 6 Gray, 302, it was further decided that a deputy who had attached property may sue the sheriff himself for the tort of another deputy in taking such property on another writ.

BRADFORD v. MANLY.

[18 MASS. 132.]

SALE BY SAMPLE.—A sale by sample is tantamount to an express warranty that the article sold is of the same kind as the sample.

ASSUMPSIT to recover the difference in value between two casks of cloves alleged to have been sold by sample to the plaintiff, and the cloves actually delivered. Plea, the general issue. At the trial the plaintiff offered in evidence a bill of parcels of six hundred and two pounds of cloves (kind not designated), at one dollar and fifty cents per pound, on which payment was acknowledged by the defendant. He then proved by oral testimony, to which the defendant objected, but the objection was overruled by the court, that at the time of sale the defendant came to the plaintiff's store with a sample of cloves in a paper, and asked him if he wished to purchase some cloves; that the sample was of the very best quality of Cayenne cloves; that the purchase was made accordingly, the bill of parcels given, and two casks of cloves delivered to the plaintiff, the price being that of cloves of the best quality; that the casks, when subsequently opened, were found not to contain Cayenne cloves, but a mixture of that species with another and inferior variety of the article of much less market value, and that before instituting suit the plaintiff offered to return the cloves, but the offer was refused. The jury returned a verdict for the plaintiff, having found the facts specially substantially as above stated, and also that there was no fraud on the part of the defendant. Motion for a new trial.

Shaw, for the defendant, cited: *Peake's Ev.* 112; 2 *Cai.* 48, 161 [2 *Am. Dec.* 215;] 1 *Johns.* 96, 129, 421, 413, 461, 502, 534; 7 *Mass.* 284, 518; 11 *Mass.* 27 [6 *Am. Dec.* 150;] *Finch*, 189; 1 *Str.* 414; 1 *T. R.* 133, 447; 2 *Comyn on Contracts*, 75, 265; *Cro. Jac.* 4; 1 *Dyer*, 75; 2 *East*, 314; *Cooper's Justinian*, 609, note; 10 *Mass.* 197 [6 *Am. Dec.* 109.]

Davis and Thatcher, for the plaintiff.

By Court, PARKER, C. J. The first point taken by the defendant's counsel is that parol evidence was admitted to control or explain the contract in writing which subsisted between the parties. The objection goes upon the supposition that a common bill of parcels, given upon or after the purchase of goods, is evidence, and the only proper evidence, of such a contract. But it is not so. The bargain is usually made verbally, and without any intention that it shall be put in writing; and the bill of parcels is intended only to show that the goods have been purchased and paid for. It is seldom particular or descriptive of the whole contract between the parties. But if it were not so, the paper introduced in this case is ambiguous with respect to the subject of the bargain; and the ambiguity is latent, so that parol evidence may be admitted to explain it. It states only that "two casks of cloves" were purchased, leaving it uncertain what kind of cloves, of which it appears in the case that there are at least two kinds, differing materially in quality and value. We think this objection was properly overruled.

We may then come to the principal question, namely, whether the evidence in the cause proved a contract to sell cloves of a different kind from those which were delivered. The defendant exhibited a sample, by which the plaintiff purchased. Among fair dealers there could be no question but the vendor intended to represent that the article sold was like the sample exhibited; and it would be to be lamented if the law should refuse its aid to the party who had been deceived in a purchase so made. The objection is that no action upon a warranty can be maintained, unless the warranty is express; and that no other action can be maintained unless there be a false affirmation respecting the quality of the article. If such were the law, it would very much embarrass the operations of trade, which are frequently carried on to a large amount by samples of the articles bought and sold.

The authorities cited by the defendant's counsel have been carefully looked into, and we think they do not militate with this decision, unless it be the Case of the Bezoar Stone; *Chandelor v. Lopus*, Cro. Jac. 4; S. C., Dyer, 75; which, we think, would not now be received as law in England, certainly not in our country. The vendor sold the stone, as, and for, a bezoar stone, to one unacquainted with such articles, and it turned out to be of inferior value. The court held that no action would lie, and some of the judges stated that, even if the vendor had known that it was not a bezoar, and it had been so alleged, an action could not be maintained without an express warranty.

The other case is that of *Parkinson v. Lee*, 2 East, 314. There the hops sold were of the same kind and quality as the sample, but there was an unknown deterioration by fermentation, caused by the grower of the hops, and not by the vendor. Hops being usually sold in pockets, and the quality ascertained by sample, it was held that the innocent vendor was not responsible to the vendee, for an unknown inherent defect, without an express warranty. That case does not militate with our opinion in the case at bar.

The fair import of the exhibition of a sample is that the article proposed to be sold is like that which is shown as a parcel of the article; it is intended to save the purchaser the trouble of examining the whole quantity. It certainly means as much as this: "The thing I offer to sell is of the same kind, and essentially of the same quality, as the specimen I give you." I do not know that it would be going too far to say that it amounts to a declaration that it is equally sound and good. But it is not necessary to go so far in the present case, and we are not disposed to question the correctness of the decision in *Parkinson v. Lee*.

It is expressly found by the jury in the case at bar, that the cloves delivered were different in kind from those which composed the sample, and inferior in value, not from decay or exposure, but that there is a specific difference in the respective plants from which they are produced. Surely, if a man were to exhibit to me a parcel of Hyson tea as a sample, to induce me to buy a chest, and I should pay him the price of Hyson, and he should deliver me a chest of Bohea or Sonchong, I might recover the difference in value, if he should refuse to do me justice, although he did not expressly warrant that the tea in the chest was the same as that in the sample. Indeed, the exhibition of a sample must, in all fair dealing, stand in lieu of a warranty or affirmation. It is a silent, symbolical warranty, perfectly understood by the parties, and adopted and used for the convenience of trade.

The cases must be very strong to establish a principle so unjust, and so productive of distrust and jealousy among traders, as that contended for by the defendant's counsel. For what purpose is the sample exhibited, unless it is intended as a representative of the thing to be sold? What would an honorable merchant say, if, when he took from a mass of sugar or coffee a small parcel, and offered to sell by it, the man who was dealing with him should ask him if it was a fair sample, and

call upon him to warrant it so? Mercantile honor would instantly take the alarm; and if such questions should become necessary, there would be no need of that honor, which happily is now general, and almost universally relied upon. That there is not an unknown and invisible defect, owing to natural causes, or to previous management by some former dealer, he may not be presumed to affirm when he shows the sample; and, as to these particulars, an express warranty may be required, consistently with confidence in the fair dealing of the vendor. But that the thing is the same, generically and specifically, as that which he shows for it, he certainly undertakes, and, if a different thing is delivered, he does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him.

A case similar to this in principle came before me two or three years ago, at *nisi prius*. An advertisement appeared in the papers, which was published by a very respectable mercantile house, offering for sale good Caraccas cocoa. The plaintiff made a purchase of a considerable quantity, and shipped it to Spain, having examined it at the store before he purchased, but he did not know the difference between Caraccas and other cocoa. In the market to which he shipped it, there was a considerable difference in value, in favor of the Caraccas. It was proved that the cocoa was of the growth of some other place, and that it was not worth so much in that market. I held that the advertisement was equal to an express warranty, and the jury gave damages accordingly. The defendants had eminent counsel, and they thought of saving the question, but afterwards abandoned it, and suffered judgment to go. Surely, if a sample of Caraccas cocoa had been shown to the purchaser, and any other cocoa had been delivered to him, the case would not have been less strong.

We are all decidedly of the opinion, that a sale by sample is tantamount to an express warranty, that the sample is a true representative of the kind. There must, therefore, be entered judgment according to the verdict.

Parsons, in a note to his work on Contracts, vol. 1, p. 585, note (t), terms this "a leading case in America," upon the subject of sales by sample. It is cited with approval in nearly all the cases which have since occurred in the United States relating to such sales, and the rule which it lays down, though for a time strenuously opposed by such eminent jurists as Gibson, Bronson and Paige, may now be regarded as firmly established; that where goods are sold by sample the seller is held to warrant that they correspond with the sample.

2 Kent. 481; Benjamin on Sales, sec. 648; *Dickinson v. Gay*, 7 Allen, 29; *Williams v. Spafford*, 8 Pick. 250; *Oneida Mfg. Soc. v. Lawrence*, 4 Cow. 440; *Gallagher v. Waring*, 9 Wend. 20; *Boorman v. Jenkins*, 12 Id. 566; *Waring v. Mason*, 18 Id. 425; *Hargous v. Stone*, 5 N. Y. 73; *Beirne v. Dord*, Id. 95; *Phillipi v. Gove*, 4 Rob. (La.) 315; *Hall v. Plassan*, 19 La. An. 11; *Ricks v. Dillahunty*, 8 Porter (Ala.) 140; *Mages v. Billingsley*, 3 Ala. 679; *Brantley v. Thomas*, 22 Texas, 270; *Gunther v. Atwell*, 19 Md. 157; *Otto v. Alderson*, 10 Sm. and Mar. 476; *Borrekins v. Bevan*, 3 Rawle, 37; *Hanson v. Busse*, 45 Ill. 498; *Day v. Raguet*, 14 Minn. 273; *Bragg v. Morrill*, 49 Vt. 45 S. C. 20 Am. Rep. 102. See, also, the early New York case of *Sands v. Taylor*, 4 Am. Dec. 374; S. C.; 5 Johns. 395. The authorities are not uniform, however, upon some of the incidental questions growing out of the subject, in relation to the nature of such sales, and to the proper construction of the warranty arising upon them.

WHAT CONSTITUTES A SALE BY SAMPLE.—The mere exhibition of a specimen of the goods during a negotiation for their sale does not, of itself, make it a sale by sample. There must be an understanding between the parties that they are dealing with reference to the sample: *Waring v. Mason*, 18 Wend. 425; *Beirne v. Dord*, 5 N. Y. 95; *Day v. Raguet*, 14 Minn. 273. It would be a hard and dangerous rule to hold that in every case where a vendor of goods makes an attractive display of a portion of his wares, in order to obtain custom, he is to be bound by a warranty of what he succeeds in selling. It may well be nothing more than *simplex commendatio*. In *Gunther v. Atwell*, 19 Md. 157, the court say: "In order that the principle may be applied, it is necessary, in making the sale, that the sample should be so used between the buyer and seller, as to express or become a part of the contract, or in other words that the sample should amount to, and take the place of, an express averment by the seller of the condition and quality of the goods, upon which the buyer relies in making the purchase." The question as to whether a particular sale is by sample or not, must, therefore, be left to the jury upon all the circumstances of the case: *Brower v. Lewis*, 19 Barb. 574; *Boorman v. Jenkins*, 12 Wend. 566.

NATURE OF WARRANTY.—Most of the authorities speak of the warranty arising upon sales by sample as an implied warranty: *Sands v. Taylor*, 4 Am. Dec. 374; *Bragg v. Morrill*, 49 Vt. 45, and other cases above cited. Chief Justice Gibson, in his dissenting opinion in *Borrekins v. Bevan*, 3 Rawle, 37, says that it is very accurately termed an "implied warranty" in *Sands v. Taylor*. On the other hand, in the principal case, "it is declared to be tantamount to an express warranty." So in the early South Carolina case of *Vanderhoof v. Mac Taggart*, 2 Am. Dec. 667. Chief Justice Church, also, in *Gurney v. Atlantic, etc. R. R. Co.*, 58 N. Y. 564, says that it is properly "an express warranty." This certainly seems to be the more accurate designation. The fact that the court looks to the understanding of the parties in sales of this kind to determine in each particular case whether the warranty exists or not, seems to place it appropriately in the class of express warranties. And this construction of it seems to be consonant with the rules of law which are usually held applicable to it. As a general proposition, it may be stated that the exhibition of a sample in a negotiation for a sale, amounts to a warranty only under circumstances which would make a verbal declaration as to the quality of the goods also a warranty. In most of the states the doctrine of the later cases is, that any positive and distinct affirmation made during a sale, concerning the quality of the thing sold, which is relied upon by the buyer, and induces him to make the purchase, is an express

warranty, though no formal words of warranty be used: 1 Parsons on Contracts, 580, note n., and this, too, even if the affirmation be not intended as a warranty: *Swithers v. Bircher*, 2 Mo. App. 510; *Pemberton v. Hawkins*, 51 N. Y. 198, S. C. 10 Am. Rep. 595; see note to *Sekas v. Woods*, 2 Am. Dec. 221; see, also, note to *Emerson v. Brigham*, 6 Am. Dec. 113, for a full review of the authorities. Certainly the exhibition of a pretended specimen of goods while bargaining for the sale of them, is as unequivocal a declaration of their character and quality as could well be made, and if the buyer trusts to it, and is influenced by it to make the purchase, having no opportunity for a personal examination of the bulk of the commodity, there is no valid reason why it should not be regarded as an express warranty. In this view of the warranty arising in such a case it is no departure from the common law rule of *caveat emptor* upon sales of personal property, which is the objection made to it by Gibson, C. J., in *Borrekens v. Bevan*, 3 Rawls, 87; Bronson, J., in *Moses v. Mead*, 1 Denio, 386; and Senator Paige, in *Waring v. Mason*, 18 Wend. 425. The case of an express warranty is an exception to that rule as ancient as the rule itself.

EXTENT OF THE WARRANTY.—The general doctrine of the cases is, that the warranty, in sales of this kind, is that the goods shall correspond with the sample, both in kind and in quality: *Beirne v. Dorda*, 5 N. Y. 95; *Mages v. Billingsley*, 3 Ala. 679, and other cases above cited. In Pennsylvania, however, the weighty authority of Chief Justice Gibson, though it was not sufficient to prevent the adoption of the rule allowing a warranty upon such a sale, succeeded in engrafting upon it the limitation that the seller in such a case is to be held only to warrant that the bulk shall correspond with the sample in kind, and be simply merchantable, unless there are circumstances to fix the character of the sample as a standard of quality: *Boyd v. Wilson*, 83 Penn. St. 319; S. C. 24 Am. Rep. 176, citing a number of Pennsylvania cases. Upon the theory, however, that the warranty in such sales is express, and that the intention and understanding of the parties is the controlling circumstance, the Pennsylvania decisions may, perhaps, be reconciled with the general current of the authorities. It seems to be conceded in those decisions that the sample is to be regarded by the court just as the parties have dealt with it. If they have treated it as a standard of quality, it will be so taken. In most cases this rule, liberally construed, would lead to the same result as that generally held in other states. In the case of *Boyd v. Wilson*, *supra*, the sale was of a lot of eight hundred and fifty cans of corn, known as "King's brand." The purchaser took three of the cans and tried them, and found them "good and sweet." He accordingly made the purchase. On delivery, some of the cans were found inferior to the sample. As there was nothing in the case to indicate that the parties intended that the cans sampled should be a standard of the quality of all the cans, it was held that the warranty was simply that the corn was "King's brand," and merchantable under that designation. Probably under any view of the law the seller would not, upon the facts of this particular case, have been held to warrant that all the cans were equal to the sample in goodness. It would seem, however, that generally, if the warranty exists at all, it ought, unless there is some circumstance to indicate a contrary understanding, to extend to quality as well as to kind. That is to say, upon principle, the seller should be bound to warrant whatever is indicated by the sample.

VENDOR'S KNOWLEDGE.—It may be stated as a general rule that the fact that the vendor does not know that the goods are inferior to the sample does not vary the warranty. If the buyer purchases upon the faith of it, it is

enough. Thus where bales of cotton were sold by samples made up by a warehouseman who was indifferent between the parties, and were afterwards found to be defective, the vendor having brought the samples to the buyer and having induced him to purchase by them, was held to his warranty: *Whittaker v. Hueske*, 29 Texas, 355. This is precisely analogous to the rule in ordinary cases of express warranty, that the seller is bound by his positive affirmations with respect to the article sold, though he has made them in perfect good faith, not knowing their falsity: See 1 Parsons on Contracts, 580, note (n). Where, however, the purchaser knows, or from the circumstances is authorized to presume, that the seller has no knowledge of the bulk beyond what is afforded by an inspection of the sample, the rule of *caveat emptor* applies: *Gunther v. Atwell*, 19 Md. 157. That case arose upon a sale of tobacco by a sample made up by a state inspector of tobacco under a statute of Maryland. In the case of *Ormsrod v. Huth*, 14 M. & W. 651, it was held that one who sold cotton by samples taken in the usual way, was not liable for a defect existing in the interior of the bales, unless he knew of it at the time of the sale. That, however, was an action on the case for false representation. And where the sample and the goods delivered correspond in quality, although it afterwards turns out that both buyer and seller were mistaken as to the character of the article, and that it is not what the buyer thought he was purchasing, unless the sale takes place under such circumstances that the law will imply a warranty to furnish goods known under a specific commercial designation, it has been held that the vendor is not liable. In the case of *Carter v. Crick*, 4 H. & N. 412, the plaintiff, having heard that the defendant had some seed-barley to sell, went to his counting-house to purchase it, the defendant's agent exhibiting to him a sample of what he thought was seed-barley. The plaintiff examined it and pronounced it good seed-barley, and thereupon made the purchase. The barley when delivered was identical in kind and quality with the sample, but on examination it turned out that it was not seed-barley, but a variety known as "barley-bigg." Martin B., in passing upon the case, said: "I think there was no warranty (that it was seed-barley) * * * The person who managed his (the defendant's) business, produced a sample of barley, which was supposed to be seed-barley. The plaintiff agreed to buy it as seed-barley; and the impression on the minds of both was that the barley was seed-barley. The plaintiff purchased that particular thing which the defendant called seed-barley, and the plaintiff called seed-barley; it is the same as if they had given it any other name." So in the case of *Dickinson v. Gay*, 7 Allen, 29, which arose upon a sale by sample of unprinted satinest cloths. The goods corresponded with the sample, but there was a latent defect in both, not discoverable at the time of the purchase, they having been damaged by mildew. The court held, citing the principal case, that the sale was by sample, that "on such a sale it is admitted that the law implies a warranty that the goods shall be equal in quality to the sample," but that this warranty will not protect the buyer against a latent defect, common both to the sample and to the goods delivered.

The rule thus laid down simply gives effect to the warranty that the goods shall be such as the affirmation made by the exhibition of the sample represents them to be. It is held, however, in some of the later cases in England that where goods are sold under a specified commercial description, either by sample, or even after inspection of bulk "there is in the contract" an implied term, notwithstanding the sample or inspection, that the goods shall reasonably answer the specified description in its commercial sense; and that the sample in such cases is to be "looked upon as a mere expression of the

quality of the article, not of its essential character." Hence, "notwithstanding the bulk be fairly shown or agree with the sample, yet, if from adulteration or other causes, not appearing by the inspection or sample, though not known to the seller, the bulk does not reasonably answer the description in a commercial sense, the seller is liable: *Mody v. Gregson*, L. R. 4 Ex. Ca. 56, citing *Nichols v. Godts*, 10 Ex. 191. In the latter case there was a sale of "foreign refined rape-oil," warranted only equal to sample; the jury found that the oil tendered was the same as the sample, but that it was not "foreign refined rape oil," but a mixture of that and another kind of oil. The court held that the sample referred to quality only, and could not control the contract in respect to the essential character of the article to be delivered. To the same effect is *Josling v. Kingsford*, 13 C. B. 447. The theory of these latter cases is that where there is an express agreement to deliver an article known by a specific name, that, rather than the sample, is to be taken as the criterion by which to determine the understanding of the parties as to the subject-matter of the contract. In the absence of such an agreement, however, the buyer may unquestionably rely upon the sample as the true expression of the seller's meaning, and must at the same time accept it as the sole measure of his liability. In such cases the sample is made the "touch-stone" of the contract, as the court say in *Mody v. Gregson*, *supra*.

OPPORTUNITY TO EXAMINE THE GOODS.—The general rule seems to be that the warranty arising upon sales by sample is limited to cases where the buyer has no opportunity to inspect the goods: See 1 Parsons on Con. 585; *Waring v. Mason*, *Boorman v. Jenkins*, *Hargous v. Stone*, and *Brantley v. Thomas*, *supra*. If he has the opportunity and fails to make use of his privilege, the rule is *caveat emptor*. In the case of *Barnard v. Kellogg*, 10 Wall. 383, Davis, J., delivering the opinion of the court says: "No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor the grower of the article he sells, the maxim of *caveat emptor* applies. * * * And there is no hardship in it, because if the seller distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. * * * And he cannot relieve himself and charge the seller on the ground that the examination will occupy time, and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample, is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent." In *Hyatt v. Boyle*, 5 Gill & Johns. 110, it is said that to excuse the purchaser the examination must be, "morally speaking, impracticable." Hence, where the purchaser of several bales of hemp was told to examine it himself, and did cut open and examine one of the bales, but omitted to do so as to the rest, it was held that it was not a sale by sample, and that there was no warranty: *Salisbury v. Stainer*, 19 Wend. 159. It is conceived, however, that if the conduct of the vendor should induce the purchaser to trust entirely to an inspection of the sample the ruling would be different.

PAROL PROOF.—The doctrine of the principal case as to the admissibility of parol evidence to show that the sale was by sample, where there is no mention of that fact in the bill of parcels, has been referred to with approbation in a number of subsequent cases: *Hasard v. Loring*, 10 Cush. 268;

Hogins v. Plympton, 11 Pick. 100; *Stoops v. Smith*, 100 Mass. 66; *Miller v. Stevens*, Id. 518. In *Davis v. Bradley*, 24 Vt. 62, the court say that the case of *Bradford v. Manly*, on this point, can only be sustained on the ground that the bill of parcels was nothing more than a memorandum of the property sold, and that the parties did not intend to put the evidence of their contract and sale in writing. There was in the case of *Waring v. Mason*, above cited, no reference to the sample, either in the bill of parcels or in the memorandum of sale in the broker's book, but the court nevertheless admitted parol evidence that the sale was made by sample. In *Randall v. Rhodes*, 1 Curtis C. C. 92, the principal case is cited on a similar question, and it is held that the construction given to a bill of parcels is not applicable to a written memorandum of the sale of a ship signed by the vendors and apparently setting forth the terms of the contract. It was held in *Meyer v. Everth*, 4 Camp. 22, apparently contrary to the doctrine of the principal case, that it cannot be proved by parol that the sale was made by sample if there is no mention of the sample in the sale note. The distinction running through the cases seems to be that if from the circumstances it can be determined that it was not the intention of the parties to embody the terms of the contract in the writing parol evidence will be admitted, otherwise not.

USAGE OF TRADE.—There is some conflict in the cases as to whether evidence of a custom or usage is admissible to control or vary the effect of a sale by sample. In *Boorman v. Jenkins*, 12 Wend. 566, a usage as to sales of cotton by sample was permitted to be proved to show that such samples were made up by the agents of the cotton-brokers, and sales made by them, quoting Chief Justice Gibbs, in 1 Stark Cas. 67, as saying that evidence may be received of a mercantile usage to show the meaning of a term in a contract, just as you look into a dictionary to ascertain the meaning of words. In *Willings v. Consequa*, 1 Pet. C. C. 225, the court allowed proof of usage among merchants in China that upon a sale of tea, even where there is an express contract to furnish tea of a particular description, if the purchaser examine samples sent him by the Hong merchant, the latter is bound only to furnish goods corresponding with the samples. In *Schnitzer v. Oriental Print Works*, 114 Mass. 123, a usage in Boston was proved that where berries were sold by sample, and the average quality of them corresponded with the sample, the purchaser was bound to take them. The court say: "We cannot see that, as a matter of law, a custom in a particular trade, to regard a sample as representing the average quality of an entire cargo or lot of merchandise, may not have a reasonable foundation, and be a good and valid custom entering into the contracts of parties. To a greater or less degree, it is necessarily so in all cases where the sale is of articles in their nature not uniform in quality." But in the case of *Dickinson v. Gay*, above cited, the court would not admit evidence of a usage among merchants that where the sample and the bulk were both damaged in such a way that it could not be discovered until the satinet cloths were printed, the seller should make good the damage occasioned by the defect. The learned judge who delivered the opinion of the court went into an examination of the cases upon the subject of usages of trade, and deduced the rule that a usage could not be admitted to contradict the terms or legal interpretation and effect of a contract, and that the usage when proved must be of a course of dealing, and not of the mere adoption of a peculiar or local rule of law as to the rights and obligations of the parties. The supreme court, in the case of *Barnard v. Kellogg*, 10 Wall. 383, would not permit proof of a usage that in sales of cotton by sample there is an implied warranty that it is not falsely or deceitfully packed. Justice Davis, delivering the

opinion of the court, says: "The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation, on the theory that the parties know of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. 'Usage,' says Lord Lyndhurst, 'may be admissible to explain what is doubtful; it is never admissible to contradict what is plain. And it is well settled that usage cannot be allowed to subvert the settled rules of law.'" See, on the general doctrine of usages of trade, an excellent article in the *Central Law Journal* for Nov. 18, 1878; also the American note to *Wigglesworth v. Dullison*, 1 Sm. Lea. Cas. 498; and *Haskins v. Warren*, 115 Mass. 514.

WAIVER OF WARRANTY.—It was held in *Willings v. Consequa*, 1 Pet. C. 301, that an examination of samples will not amount to a waiver of an express warranty. So in *Deebe v. Robert*, 12 Wend. 413, where it was one of the terms of the contract that the agent of the purchaser should draw fresh samples of the cotton, it was decided that the subsequent drawing and approving of such samples did not waive the original warranty. In England it has been decided also that the examination and approval of samples will not waive the implied warranty of the merchantable quality of the goods, where the seller is the manufacturer of them: *Mody v. Gregson*, L. R. 4 Ex. 49, and the cases there cited. The English cases go upon the theory that the warranty arising from the exhibition of a sample is superadded for the benefit of the purchaser, and so does not take the place of warranties existing by implication of law. The tendency of those cases seems to be toward the doctrine that where the warranties upon the sale of a chattel are consistent with each other they may be cumulative: *Mody v. Gregson*, *supra*.

AUTHORITY OF AGENT TO SELL BY SAMPLE.—Where one has a general agency to sell goods for another, he may bind his principal by a warranty, and may, therefore, sell by sample: *Schuhardt v. Allens*, 1 Wall. 369; *The Monte Allegro*, 9 Wheat. 644; *Waring v. Mason*, 18 Wend. 425; *Andrews v. Kneeland*, 6 Cow. 354.

RESCISSION OF SALE.—There is some confusion among the authorities in this country as to whether upon an executed sale with warranty of a chattel in case the purchaser has any right to rescind the contract and return the article if it does not conform to the warranty. In *Lyon v. Bertram*, 20 How. 149, it is termed "an open question." The right is affirmed by the Massachusetts cases generally. See *Bryant v. Isburgh*, 13 Gray, 607, where the principal case is cited and relied upon as authority for this doctrine. On the other hand, the right is denied in *Thornton v. Wynne*, 12 Wheat. 183; *Kass v. Johns*, 10 Watts, 107; *West v. Cutting*, 19 Vt. 536. It seems to be well settled in England that no such right exists unless there is a stipulation to that effect in the contract: *Street v. Blay*, 2 B. & Ad. 456; *Dawson v. Collins*, 10 C. B. 527. There is no question, however, that in a sale by sample of goods for future delivery, the rule is as stated in the principal case, that if the article when delivered does not correspond with the sample, the purchaser may refuse to take it, or, if he chooses, he may receive it and set up the defect

in an action for the price to secure an abatement, or have his action on the warranty: *Dawson v. Collis*, 10 C. B. 527; *Street v. Blay*, 2 B. & Ad. 456; *Magee v. Billingsley*, 3 Ala. 679; *Waring v. Mason*, 18 Wend. 425; *Merriman v. Chapman*, 32 Conn. 146; *Dailey v. Green*, 15 Penn. 118; *Mondell v. Steel*, 858. See American notes to *Chandler v. Lopus*, 1 Sm. Lea. Cas. 326. On account of this distinction between this class of cases and those of an ordinary executed sale of a specific chattel with warranty, the learned American editors of Smith's Leading Cases are inclined to hold that a sale by sample is not properly a sale with warranty, but is in the nature of a conditional sale. See note above cited; see also *Gunther v. Atwell*, 19 Md. 157. The true construction of such sales is perhaps that until delivery and acceptance of the goods they are conditional, but after they have become executed they are simply sales with warranty.

INGRAHAM v. GEYER.

[13 Mass. 146.]

FOREIGN ASSIGNMENT, WHEN VOID.—An assignment by an insolvent debtor in Pennsylvania, of all his property in trust for such of his creditors as should, within four months, release their demands against him, the surplus to be divided *pro rata* among his other creditors, and the remainder, if any, to be paid over to the insolvent, was held void as against a creditor here, who, after such assignment and notice thereof to a debtor here, summoned such debtor as the trustee of the insolvent.

SOCIETAS to have execution against the defendant as trustee of W. Birnie and J. F. Rouchendorff, merchants and copartners in the city of Philadelphia, Pennsylvania. The defendant answered in substance, that at the time of the service of the original process upon him, he had in his hands one thousand two hundred and ninety-eight dollars and six cents belonging to the said Birnie and Rouchendorff, except that prior thereto he had been notified that the said Birnie and Rouchendorff had made an assignment of all their property in trust for such of their creditors as should within four months release all their demands against them, the surplus to be distributed *pro rata* among their other creditors, and the remainder, if any, to be paid over to the assignors.

Ritchie, for the plaintiff, cited *Widgery v. Haskell*, 5 Mass. 144 [4 Am. Dec. 41.]

Munroe, for the defendant, cited *Will v. Franklin*, 1 Binn. 502 [2 Am. Dec. 474]; *Dix v. Cobb*, 4 Mass. 508; *Foster v. Sinkler*, Id. 450; *Maine Insurance Co. v. Weeks*, 7 Id. 438.

By Court, PARKER, C. J. The question in this case is, whether the assignment made by the debtor in Philadelphia is valid here,

so as to defeat an attachment of the debt under our trustee process.

This assignment could not be supported if made within this state by parties residing or living here, and with a view to be here executed. It is voluntary on the part of the debtor, and involuntary on the part of his creditor. It has no legal consideration; for the debts of those creditors who are to become parties are not discharged at the time; and it shuts out from a participation of the funds all the creditors who will not give an absolute discharge of their debts. There is, indeed, but one party to the indenture, namely, the assignor; for the persons named are his agents until the creditors sign the instrument. Such an assignment could not be supported here: *Blanchard v. Russell* [ante, 106]. It is said that it is valid in Pennsylvania, where it was made, and that it ought to be admitted here upon principles of comity. But we have no legal evidence that it would be valid in that state against dissenting creditors. No statute of Pennsylvania has been shown, giving it validity; and the reasoning of the court, in the case referred to by the defendant's counsel, does not prove that such an assignment would be supported even there.

But supposing the assignment to have legal effect in the state of Pennsylvania, so as to bind creditors within that state; it does not follow that it is to be received here, to the prejudice of creditors who are our own citizens. It is not required by the comity of nations. We might give effect to the assignment, so far as to permit the assignees to recover the debt in their own names, as would be done in the case of assignees under the bankrupt or insolvent laws of foreign countries. But, even in those cases, a citizen who had actually seized the debt by attachment, before it was paid over to the assignee, would be protected in his lien; certainly if no process had actually been commenced by the assignee to recover it. The case of *Le Chevalier v. Lynch*, Doug. 170, is strong to this point, for there the attaching creditor was protected against the assignees of the bankrupt in England, although the plantation in which the foreign attachment was instituted was within the same dominion where the bankrupt law was enacted; and this case has been recognized as law by this court in the case of *Dawes v. Boylston*, 9 Mass. 350 [6 Am. Dec. 72.]

To give effect to this assignment, so as to intercept the lien obtained by a creditor here, under the laws of our own state, when by the effect of that assignment he would be deprived of

all opportunity of participating with the creditors in Pennsylvania in the proceeds of the debtor's effects, would be an undue partiality towards foreign creditors, not warranted by the principles of justice nor required by the comity of nations.

Defendant adjudged trustee.

OLIVER v. HOUDLET.

[13 Mass. 287.]

CONTRACTS OF INFANTS.—A sale made to an infant by a person of full age is voidable only by the infant.

POWER OF GUARDIAN.—A guardian has no power to avoid any contract made with his infant ward which is for the benefit of the latter.

TROVER for certain cattle. Plea, the general issue. At the trial it appeared that the defendant took the cattle upon an execution as the property of one James N. Lithgow. The plaintiffs admitted that Lithgow had once owned the cattle, but proved that he had sold them to one Butler, of whom the plaintiffs bought them. It further appeared from the testimony of one A. Lithgow, a minor, who was called as a witness for the plaintiffs, that the cattle were put into his possession immediately after the purchase by the plaintiffs, and that he considered that they were his, and that he was holding them when they were taken; that Oliver, one of the plaintiffs, being indebted to the minor, agreed that his part of the cattle should go in payment of the debt; that Clap, the other plaintiff, who was the guardian of the said minor, agreed that the minor might take his, Clap's, part of the cattle and account for their value when he should come of age, but that in disposing of them he should consult his said guardian, and that he had already disposed of some of them with his guardian's consent. There was no evidence that the guardian consented to the agreement between Oliver and the minor. The court instructed the jury upon these facts, in his opinion, the plaintiffs had such a property in the cattle at the time of the taking that they could maintain the action. Verdict for the plaintiffs, and a motion for a new trial on the part of the defendant upon exceptions to the above instruction.

Orr, for the plaintiffs.

Mellen, for the defendants.

By Court, *WILDE, J.* This case turns on a question of prop-

erty, depending upon two sales of cattle made by the plaintiff to one A. J. S. G. Lithgow. It has been contended that these sales were void *ab initio*, the said Lithgow being a minor, not capable by law of making a valid contract.

Doubtless an act merely void may be treated as a nullity by either party and even by a stranger. Some acts of infants are of this description, and it has been said that all such as are apparently prejudicial to his interests are to be so considered. Thus a grant, surrender or lease by an infant, without reservation of rent, have been adjudged void; such acts being apparently to the infant's prejudice. But in the case of *Zouch v. Parsons*, 3 Burr. 1794, they were held to be voidable only, and for reasons which seem very cogent and satisfactory.

It would be more correct, therefore, to say that those acts of an infant are void which not only apparently but necessarily operate to his prejudice. The benefit of the infant is the great point to be regarded; the object of the law being to protect his imbecility and indiscretion from injury through his own imprudence or by the craft of others. The general rule is that infancy is a personal privilege of which no one can take advantage but the infant himself; and therefore that his contracts, although voidable by him, shall bind the person of full age. This rule seems to require that all contracts of infants should be held voidable rather than void. But however this may be, all the books agree that those which are beneficial or have a semblance of benefit to the infant, are only voidable. Of this character are all sales made by persons of full age to infants. These have at least the semblance of benefit to the vendees. No case can be found in which such a sale has been held void or voidable by the vendor, on the ground of the vendee's infancy. Even a *feme covert*, whose conveyances and other contracts are clearly void, may purchase an estate without the consent of her husband, and the conveyance will be good until avoided by him during coverture, or by her after his death: 2 Black. Com. 293; Co. Lit. 3, a. Most clearly then the sales under consideration are not void.

But it has been further argued that these sales, if voidable, may be avoided by the plaintiff, Clap, by virtue of his authority as guardian of the minor. No case has been cited in support of this position, and we know of no position of law by which it can be maintained. The authority and interest of a guardian extend only to such things as may be for the interest and advantage of the ward. If an infant make a contract from which

he derives a benefit, it cannot be avoided by his guardian; for this being injurious to the infant would be a violation of the guardian's duty: Bac. Abr. Tit. Guardian, G; Co. Lit. 17, b, 89, a. The rule of the civil law is that pupils may better their condition but not impair it without the authority of their tutors: Inst. Tit. De Auctor, Tut.

But should it be admitted that a guardian may avoid the contracts of his ward, made without his consent, it will hardly be contended that he can be permitted to do it, when the contract, at the time of making it, was confirmed by his assent. Now, one of the sales under consideration was made by Clap, the guardian, and his assent is manifest from the act itself. There is no positive proof of Clap's assent to the sale by Oliver; but there is abundant evidence from which it may be inferred, and which ought to have been submitted to the jury, if such assent be material to the issue.

As the direction to the jury was not conformable to these principles, the verdict must be set aside, and a new trial granted.

It was decided in *Kendall v. Lawrence*, 22 Peck. 543, where the principal case was cited and relied upon as authority, that where a minor having made a conveyance of land during his nonage, had not taken any steps towards affirming or disaffirming it after attaining his majority, he had no right in the land which could be reached by attachment; and that his right to avoid such deed was strictly a personal privilege, which could be exercised only by himself or his heirs. In *Chandler v. Simmons*, 97 Mass. 511, it was said that the rule laid down in the principal case, that the guardian of a minor cannot disaffirm his ward's contract, must go upon the theory that the minor ought to have the right of electing after coming of age whether he will ratify or avoid such contracts, and that it would be inconsistent with this privilege to permit the guardian to annul such contracts during his ward's minority. It was held, however, that this prohibition did not extend to a guardian appointed for such minor, as a spendthrift, after his coming of age, and that such guardian might avoid the contracts of his ward made during infancy as fully as the ward himself might do.

Upon the point that the privilege of a minor to disaffirm his contracts is personal, the principal case is cited in Tyler on Infancy and Coverture, 59, 62, and in the notes to *Nightingale v. Wilmington*, page 48, and *Whittingham's Case*, page 89, of Ewell's Leading Cases. In the note to the last-mentioned case, the whole subject is examined and the authorities collected.

The rule stated in the principal case as to what contracts of an infant are void, and what voidable, is somewhat different from that laid down by Lord Chief Justice Eyre in *Keane v. Boycott*, 2 H. Bl. 515, holding that an infant's contract is void if the court can pronounce it to be to his prejudice. As will be seen, the principal case adds the limitation that the contract must "necessarily" operate to the infant's prejudice, or it will be voidable and not void. As stated in the American note to Bingham on Infancy, 11, the

tendency of the modern decisions is to hold all the contracts of an infant voidable rather than void; and to restrict the exceptions within the narrowest possible limits. The whole subject is learnedly discussed in the note to *Tucker v. Moreland* and *Vase v. Smith*, 1 Am. Lea. Cas. 243. Judge Story, in deciding *Tucker v. Moreland*, referred with apparent approval to the rule adopted in the principal case. It is stated, however, in the note referred to that while the rule has been approved of in the courts of several states, it has been excepted to in others. Upon a careful review of all the authorities, the editors say: "The numerous decisions which have been had in this country justify the settlement of the following definite rule, as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessities; the only act which he is under a legal incapacity to perform is the appointment of an attorney; all other acts, executed or executory, are voidable or confirmable by him at his election. No reference is had at present to the acts of an infant as executor, or to transactions between himself and his guardian." The following are some of the cases in which the rule followed is in substantial conformity with that stated in the principal case: *Fridge v. State*, 3 Gill and Johnson, 115; *Ridgeley v. Crandall*, 4 Md. 435; *Wheaton v. East*, 5 Yerger, 41; *Whitney v. Dutch*, *post*; see, also, *Dutton v. Brown*, 31 Mich. 182. In *Robinson v. Weeks*, 56 Maine, 102, the court say: "We think the true doctrine is that the contracts of minors may be divided into three classes: 1. Binding—if for necessities at fair and just rates; 2. Void—if manifestly and necessarily prejudicial, as of suretyship, gift, naked release, appointment of agents, confession of judgment or the like. 3. Voidable, at the election of the minor, either during his minority or within a reasonable time after he comes of age; and this last case includes all the agreements of a minor which may be beneficial and are not for necessities until fully executed on both sides, and all executed contracts of this sort where the other party can be placed substantially in *status quo*."

CHADDOCK v. BRIGGS.

[15 MASS. 248.]

ACTIONABLE SLANDER.—A charge of drunkenness against a minister is actionable without a *colloquium* referring to his office or profession, and without proof of special damage.

ACTION on the case for slander. The declaration charged the defendant, in substance, with having spoken, uttered and published of, and concerning the plaintiff, who was described as a minister of the gospel legally settled over the Congregational church and society in Hanover, the following false, scandalous, malicious and defamatory words, namely: "Old Chaddock" (meaning the plaintiff), "stayed at our house last night, and was pretty devilish drunk; he was so drunk he could not find his key. He made out to stagger up to the house. He was drunk;" and also the following other false, etc., words, namely: "Mr. Chaddock" (meaning the plaintiff), "has had a drunken

frolic this week; he and a party went out a getting hay, got back to our house, and he got so drunk he could not get home, but stayed and slept with me," to the damage of plaintiff, etc. The words were not charged to have been spoken of the plaintiff in his clerical character, and there was no averment or proof of special damage. Verdict for the plaintiff, and a motion in arrest of judgment on the ground of the insufficiency of the declaration.

B. Whitman, for the defendant, cited *Salk*, 694; 1 Roll. Abr. 34; Cro. Car. 83; 3 Wils. 377.

Hobart, for the plaintiff, cited *Dodd v. Robinson*, Aleyn, 63; *McMillan v. Birch*, 1 Binn. 178 [2 Am. Dec. 426]; *Hartley v. Herring*, 8 T. R. 130; Bac. Abr. Slander, sec. 3; *Cowdry v. Highley*, Cro. Car. 270; *Stanton v. Smith*, 2 Ld. Raym. 1480.

By Court, PARKER, C. J. The plaintiff in this action is described as a minister and preacher of the gospel, legally settled and ordained over the church and religious society of the Congregational denomination in the town of Hanover, and the defendant is charged with having falsely and maliciously uttered and published of him certain words, which, with the proper innuendoes, have the effect of a direct charge upon the plaintiff of having been drunk, and this charge was made in terms which exclude the possibility of a construction consistent with the innocence of the plaintiff, being accompanied with terms of opprobrium and contempt, which necessarily aggravate the imputation in the mind of the hearers.

By the verdict of the jury it is established that the defendant spoke the words, as alleged, in reference to the plaintiff, and that they were falsely and maliciously spoken, and it is understood that an attempt, which was made at the trial, to justify the publishing by proving the truth of the words, wholly failed.

The general question, then, which the motion presents is, whether falsely and maliciously to charge a settled minister of the gospel with being drunk, and with having had a drunken frolic, so that he was unable to go home, but staggered towards another house, where he remained all night, is an actionable slander, without alleging and proving some special damage happening to the party in consequence of such slander.

And of this we cannot entertain a doubt for a moment, whether we refer to the general principles upon which actions of defamation are founded, or to the technical rules which have been applied to such actions in the numerous decisions which

have taken place in the common law courts of England and in this country.

In a note to the fourth edition of Chief Baron Comyn's Digest, vol. 1, page 273, it is observed, and we think with justice, that "there is no branch of the law in which the decided cases are so contradictory to each other, and the decisions so frequently irreconcilable with the avowed principles on which they are founded, as the action on the case for words;" and it is further observed that "what words are actionable or not will be more satisfactorily determined by an accurate application of the principles on which such actions depend than by a reference to adjudged cases, especially those in the more ancient authors."

It may be laid down as a general principle that all defamatory words published maliciously of another are actionable; because being injurious to the reputation, and having a tendency to affect the business or comfort of the party against whom they are spoken, it is suitable and proper that a remedy should be provided by the laws.

Some words, however, although spoken falsely and maliciously, are not of a nature to produce actual injury; because, being common terms of reproach, more indicative of the temper of the speaker than of any specific defect of character in him of whom they are spoken, it cannot be presumed that they have produced any injurious effect; and, therefore, to make such words the basis of an action it is necessary to allege and prove that some damage did actually follow the speaking of the words. Thus it is that words importing crime in the party against whom they are spoken, which, if true, would subject him to disgraceful punishment, or imputing to him some foul and loathsome disease, which would expose him to the loss of his social pleasures, are actionable without any special damage. While words, perhaps equally offensive to the individual of whom they are spoken, but which impute only some defect of moral character, such as, that he is a rascal, liar, cheat, etc., are not actionable, unless a special damage is averred, or unless they are referred, by what is called a *colloquium*, to some office, business, or trust, which would probably be injuriously affected by the truth of such imputations. For in these latter cases, as well as in the cases of words actionable in themselves, although no special damages may be proved, yet it is supposed that the slander is of a nature to cause a gradual and perhaps imperceptible damage, which may eventually amount to a serious

injury if it is suffered to pass without the animadversion of the law; and therefore probable loss or damage is sufficient ground of action, and the proper degree of compensation is to be estimated by a jury.

But, besides the classes of cases in which words have been decided to be actionable, because they impute crime or disease, and that where they become so by the proof of special damage, there is another class, in which words otherwise held not to be actionable, become so by reference to certain offices of dignity or trust, because they import a disability to exercise those offices, and expose the slandered person to the loss of them, and have a tendency to render the office itself contemptible in the eyes of the community. Thus, to say of any public officer, when speaking of his office, that he is a corrupt man, or that he has violated his trust, would subject the offender to an action without an allegation of damage; and it is laid down by Lord Chief Justice DeGrey, in the case of *Onslow v. Horne*, 3 Wils. 177, as one of the general rules governing this action, that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades and business, and do, or may, probably tend to their damage.

Upon this principle it has been held in England, that to call a clergyman a drunkard is actionable; for intemperance would render him unfit to sustain the sacred office, and expose him to the loss of it, as well as of preferment in the church. It has been attempted, in the case under consideration, to avoid the force of this example, by suggesting a distinction in the offices of a minister in the church of England, and a minister of a parish or other religious society in this country. But we see no principle upon which this distinction can be maintained unfavorably for the present action. There is a difference in the mode of appointment, the inferior clergy in England being generally appointed to their particular cares by patrons, and the superior by the crown substantially. Nor is there, in this country, anything like preferment in the church. But the essential qualities of the office are the same in both countries; ministers of the gospel being teachers and exemplars of moral and Christian duty; and a pure, and even unsuspected, moral character being necessary to their usefulness in the community. If they would be liable to the loss of their office for the gross vice of intemperance in England, they are not less exposed to the

same just punishment here. For there is no doubt that a charge of that nature, substantiated by proof before the tribunals which by custom have the right, upon the application of a religious society, to inquire into the character of their minister, would result in his dismissal from office. And so essential is an unspotted character to the salutary administration of the ministerial office, that even a reputation for immorality, although not supported by full proof, might, in some cases, be a sufficient ground for removal. So that slander of a person thus delicately situated is much more reprehensible, and is attended with much more pernicious consequences, than when uttered against officers of any other description. In the case of *Avery v. The Inhabitants of Tyringham*, 3 Mass. 181 [3 Am. Dec. 105], it was said that immoral conduct, of which intemperance would certainly be evidence, is such a misfeasance in a minister as amounts to a forfeiture of his office, of which a jury might take notice, if well proved in a suit for his salary.

But it has been said that although to call a minister a drunkard may be actionable, because it stigmatizes his general character, and imputes habitual intemperance, yet to charge him with an incidental act of drunkenness has not such consequences; because a particular fact of this sort may be consistent with general sobriety of conduct, and may be referred to accident or even imposition. In answer to this, it may be observed that the old rule of taking words in *mitiori sensu* is exploded, and the more sensible course is, to give the natural meaning and effect to the terms, according to the spirit and temper in which they appear to have been used. In other words, when they appear to have been spoken maliciously, such a meaning is to be attached to them as will be consistent with malice; and of this the jury are to judge, who will never give damages if the defendant shall show that he intended no slander, and if the words spoken are such as may have an innocent construction. But the verdict in this case has established the malice; and, indeed, from the opprobrious terms used in promulgating the fact, as well as from the repetition of it in another form of words equally offensive, there was no room to suppose the defendant innocent of an evil intent in speaking them. As to the supposed difference between a general charge of drunkenness and one particular fact this can only be important in the estimation of damages, and has probably been taken into view. One act of intoxication will, with the world, be presumptive evidence of habitual intemperance, and it will be naturally

thought that a vice is indulged in secret, of which there has been one public exposure. To say of a man that he has stolen the most trifling article which can be the subject of larceny, is, in a legal point of view, as slanderous as to say that he is a thief; although in moral estimation, there might be a difference between him who should steal bread for famishing children, and him who should rob without any circumstances of extenuation.

With respect to the supposed want of a *colloquium* referring the words to the plaintiff in his ministerial character, the very nature of the imputation shows that no such *colloquium* is necessary to be alleged. Had it been averred that the words were spoken of and concerning the plaintiff in his ministerial capacity, there would be an implication that unless a minister was intoxicated while in the public exercise of his functions, such a charge might be made against him with impunity. But a minister of the gospel is separated from the world by his public ordination, and carries with him constantly, whether in or out of the pulpit, superior obligations to exhibit, in his whole deportment, the purity of that religion which he professes to teach. He is as much in office, when retired to the bosom of his family, as when employed in public duties, and his example in the practice of all the moral virtues, and particularly of temperance, is not the least of the duties incurred by his profession.

Upon these grounds we are satisfied that the declaration is sufficient, and that the motion in arrest of judgment must be overruled.

Judgment on the verdict.

Cited in *Sheldon v. Congregational Parish in Easton*, 24 Pick. 268. A charge of drunkenness against a minister was held actionable also in *McMillan v. Birch*, 2 Am. Dec. 426; S. C. 1 Bin. 178. Both the principal case and *McMillan v. Birch* were cited in *Hogg v. Dorrah*, 2 Porter, 212, and a distinction was drawn between charges of immoral conduct against a minister and similar charges against one holding an office of trust or profit. In the case of public officers it was held that words imputing criminality or moral turpitude when uttered against them would not be actionable unless they related to past misconduct in office, while it might be otherwise as to ministers. The plaintiff in that case was a member of the legislature, and the alleged slander was a general charge that he was "a corrupt old tory." See *Oakley v. Farrington*, 1 Am. Dec. 107; S. C., 1 Johns. Ca. 130, which is also cited in *Hogg v. Dorrah*. The doctrine enunciated in the principal case that in an alleged slander the words are to be construed, not *in mitiori sensu*, but according to their ordinary signification is followed in *Hogg v. Dorrah*, *supra*, and is noticed with approval in *Townshend on Slander* (2d edition), 181, note 2, 185, note 3. The case is also cited in Mr. Townshend's work as to what words are actionable. In *Buck v. Hersey*, 31 Maine, 558, in which the principal case was cited by counsel, it was held that a charge of drunkenness

against one who in his complaint professed himself to be a "public teacher of the polite art of dancing," was not actionable where no special damage was alleged or proved, unless it was averred in the declaration to have been uttered with reference to his employment. In *O'Hanlon v. Myers*, 10 Rich. Law- (S. C.) 130, a similar charge was held not actionable, because a former statute punishing "the loathsome sin of drunkenness," by compelling the offender to sit in the stocks, was considered not to be in force; but the court intimate that the result would have been otherwise if the act had been operative, since such a punishment must be conceded to be "infamous." For charges of immoral conduct which have been in particular cases in England held actionable, when made against ministers of the gospel, see *Townshend on Slander*, 284. See, also, note to *Brooker v. Coffin*, and *Burton v. Nickerson*, 1 Am. Lea. Cas. 117, where the principal case and *McMillan v. Birch*, are both cited.

BARTLET v. WALTER.

[13 MASS. 297.]

INSURABLE INTEREST.—One who charters a vessel with a stipulation to insure has an insurable interest, and, unless questioned by the underwriters, is not bound to disclose the nature of his interest.

ASSUMPSIT on a policy of insurance on a vessel. At the trial it was proved that one Clark Finney, the owner of the vessel in question, chartered her by an agreement in writing, to Goodwin, one of the plaintiffs, who was master of the vessel, for a voyage from North Carolina to Boston or Plymouth, the said Goodwin agreeing, in addition to paying the hire and all expenses of victualing and manning and port charges, to insure said vessel for a specified sum; and that at or about the same time, Bartlet, the other plaintiff, by an indorsement on the back of said agreement signed by him, agreed with Goodwin to take and be equally concerned in said agreement. It was further proved that when the insurance was effected, nothing was said as to the particular manner in which the plaintiffs were interested. A loss having happened, the principal question was as to whether the plaintiffs had an insurable interest in the vessel sufficient to maintain the action. Verdict for the plaintiffs, by consent, subject to the opinion of this court upon all the facts.

Thomas and B. Whitman, for the plaintiffs.

The Solicitor-general and N. M. Davis, for the defendant.

By Court, PARKER, C. J. The question as to the insurable nature of the plaintiff's interest, which was the subject of this contract, has been virtually decided in several cases which have come before the court. The case of *Oliver v. Greene*, 3 Mass. 133 [3

Am. Dec. 96], which was cited in the argument, is too nearly like this to admit of any substantial distinction. In that case, the plaintiff having been the owner of one half the vessel and having chartered the other half, with a stipulation to pay a specific sum if she should be lost, insured the whole as his own property without stating the nature of his interest. He recovered for the whole, although the exception was expressly taken, and there was in that case a suggestion of concealment. In the present case the plaintiffs were only charterers of the whole vessel with a stipulation to insure her, the effect of which is the same as the agreement to pay in case of loss. And although in that case, one of the court seems to have considered the contract between the owner and the charterer to have amounted to a conditional purchase of the vessel by Oliver, yet it does not appear that the final decision was grounded upon that construction; and if it were the agreement in the case at bar might admit of the same construction.

In the case of *Locke v. North American Insurance Company*, lately decided, 13 Mass. 61, the principles which are brought into view in the present case were discussed and settled. It was there held that interest, in mercantile language, did not mean an absolute property in the thing insured, and many cases were cited to prove it. The principal difficulty which seems to occur in giving such latitude to the term interest, is overcome by the consideration that in no case where the assured has not the power to transfer the property by abandonment, can he recover any otherwise than as an indemnity for his actual loss, or the actual amount of injury to the thing insured, in case he has only a qualified property or an interest not amounting to property in the subject-matter.

The objection arising from a supposed concealment of the nature of the interest is also removed by the case last cited. It was considered there that nothing short of a false representation, or a refusal to state the truth upon inquiry, could materially affect the contract; because, generally, the nature of the interest insured is quite immaterial to the underwriter. The assured must have, *bona fide*, an interest in the property to avoid the supposed legal effect of a wager policy. But that interest may exist without a legal title to the property itself.

The case cited from Cranch's reports, of *Graves v. Boston Marine Insurance Company*, 2 Cranch, 419, is not applicable to the question; that case going only to decide that no other can claim the benefit of the insurance, but he for whom the contract is expressed to be made.

We are satisfied upon the whole matter that sufficient interest was proved at the trial to enable the plaintiffs to retain their verdict. (After some observations on the lapse of time between the first disaster which happened to the vessel and the effecting of the insurance, and on the other points made at the trial, the chief justice concluded): We are of opinion that there must be a new trial, in order that the question may be distinctly tried by the jury, whether there was any fraud or material concealment of circumstances, previous to the making of the policy. And the principal legal question being now settled, it is probable a verdict will conclusively settle the dispute between the parties.

New trial ordered.

The general doctrine of this case is noticed with approval in 1 *Parsons on Marine Insurance*, 174, 175 and 186; and in *Phillips on Insurance*, secs. 323, 419, 490, 590 and 1516. The case is also cited in *Eastern Railroad Co. v. Relief Fire Insurance Co.*, 98 Mass. 420, and the general rule with reference to "insurable interest," is thus stated: "By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself." That case was upon a policy of insurance, taken out by the railroad company, to indemnify it against loss by reason of any liability which it might incur by setting fire to property along the line of its road, by sparks from its locomotives. The supreme court of the United States say in *Insurance Co. v. Chase*, 5 Wall. 513, upon the authority of a number of English and American cases, there cited, that it is not "necessary that the assured should have a beneficial interest in the property insured," and that therefore an agent, trustee or consignee may insure. All that is necessary is that the assured shall have an interest that would be injured in the event that the peril insured against should happen.

STETSON v. KEMPTON.

[13 MASS. 372.]

ILLEGAL TAX—MUNICIPAL CORPORATION.—Towns have no authority to raise money in time of war to pay militia, or for other purposes of defense.

SAME—LIABILITY OF ASSESSORS.—Assessors of an unauthorized town tax are liable in trespass for taking property to satisfy such tax, although the assessment may include other sums lawfully laid.

TRESPASS against Kempton and other defendants for taking and carrying away the plaintiff's chaise and harness and converting the same to their own use.

The cause was submitted upon an agreed statement of facts substantially as follows: In the year 1814, during the war be-

tween the United States and Great Britain, the enemy being on the coast and in sight of and threatening the town of Fairhaven, the inhabitants of said town, at a legal meeting, at which the plaintiff was not present, unanimously voted the sum of twelve hundred dollars for the payment of additional wages to the militia and for other purposes of defense. Subsequently, in order to provide funds for the payment of this sum, together with other town charges, the defendants, as the lawful assessors of said town, assessed a tax upon the inhabitants thereof, amounting to three thousand seven hundred and nineteen dollars and seventy-three cents, in which was included the sum of fourteen dollars and thirty-one cents assessed upon the plaintiff, a taxable inhabitant of the town, for non-payment of which sum the plaintiff's chaise and harness were seized and sold by the collector to whom such assessment was committed. The greater part of the above-mentioned sum of twelve hundred dollars, not being needed for the purpose for which it was raised, was in fact applied to the ordinary expenses of the town. The plaintiff having died pending the action, his administrator was admitted to prosecute the same.

Spooner and W. Baylies, for the plaintiff, cited *Bangs v. Snow*, 1 Mass. 187, and *Dillingham v. Snow*, 5 Id. 558.

Davis, Solicitor-general, for the defendants.

By Court, PARKER, C. J. (After briefly stating the facts). The principal question which arises out of these facts is, whether the inhabitants of the town of Fairhaven had lawful right and authority in their corporate capacity to raise money, and to cause it to be assessed upon the polls and estates within the town, for the purpose stated; that is, to give additional wages to the militia, and for other purposes of defense.

The right of towns to grant or raise money, so as to bind the property of the inhabitants, or subject their persons to arrest for non-payment, is certainly derived from statute. Their corporate powers depend upon legislative charter or grant, or upon prescription, where they may have exercised the powers anciently without any particular act of incorporation. But, in all cases, the powers of towns are defined by the statute of 1785, c. 75.

In relation to the power of raising money, and causing it to be assessed and collected, they are restricted to the cases of providing for the poor, for schools, for the support of public worship, and other necessary charges. The tax which was exacted of the plaintiff must come within the last clause, or it

cannot be supported. The phrase "necessary charges" is, indeed, general, but the very generality of the expression shows that it must have a reasonable limitation. For none will suppose, that, under this form of expression, every tax would be legal which the town should choose to sanction. The proper construction of the terms must be, that, in addition to the money to be raised for the poor, schools, etc., towns might raise sums as should be necessary to meet the ordinary expenses of the year, such as the payment of such municipal officers as they should be obliged to employ, the support and defense of such actions as they might be parties to, and the expenses they would incur in performing such duties as the laws imposed, as the erection of powder-houses, providing ammunition, making and repairing highways and town roads, and other things of a like nature, which are necessary charges, because the effect of a legal discharge of their corporate duty. The erection of public buildings for the accommodation of the inhabitants, such as town-houses to assemble in, and market-houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term, "necessary;" for these may be essential to the comfort and convenience of the citizens. But it cannot be supposed that the building of a theater, a circus, or any other place of mere amusement, at the expense of the town, could be justified under the term, "necessary town charges." Nor could the inhabitants be lawfully taxed for the purpose of raising a statue or a monument, these being matters of taste and not of necessity; unless, in populous and wealthy towns, they should be thought suitable ornaments to buildings or squares, the raising and maintenance of which are within the duty and care of the governors or officers of such towns.

With respect to the defense of any town against the incursions of an enemy in time of war, it is difficult to see any principle upon which that can become a necessary town charge. It is not a corporate duty to defend the town against an enemy. This is properly the business of the state or government, and is the most essential consideration for the obligation of the citizen to contribute to the general treasury. The government is to protect, and the citizen is to pay. By the constitution of the United States, this duty is devolved upon the national government; and although it may be impracticable, in so extensive a territory, to furnish competent security to every section or point, yet it does not follow that corporations of limited powers, like towns, can take upon themselves the duty, and exact money of their citizens for the execution of it.

It cannot be pretended that a town could lawfully tax the inhabitants to raise and maintain a military force for their protection against an enemy. Such a protection, it is obvious, can only be lawfully given by the state or ruling power; and if that is not adequate, the voluntary exertions or contributions of the inhabitants must supply the deficiency. Whether for any extraordinary expense falling upon individuals, in consequence of the inability or neglect of government to afford them security, such individuals may claim to be reimbursed by the public, is a question for others to determine, not for us. Whether any money actually in the treasury, beyond what is needed for the ordinary expenses of the town, and which is unappropriated, may not be disposed of, in pursuance of a vote of the inhabitants, for the common defense of the inhabitants, is a different question from the present, and which we need not now determine.

We confine ourselves to the case before us, which is that of a tax, founded upon a vote of the inhabitants, to raise money for the purpose of giving additional wages to those of the inhabitants who should be called, as militia men, to do duty in pursuance of lawful authority. Now, to furnish the quota of militia is no part of the corporate duty of a town, or to pay them. The militia are drafted from those divisions and subdivisions of the citizens which are established by law, without regard to the territory or jurisdiction of towns; and provision is made by law for the payment of such as may be called into actual service. To give additional wages, in order to encourage such as may be drafted, may evince the sense of danger and the patriotism of a town; but it does not fall within any duty imposed by law, and it is not certain that it would produce any valuable end. For, instead of a uniform and equal payment of all those who, in other respects, are on a footing of equality, it would probably cause jealousies and dissensions, which might be highly injurious to the public service. At any rate such a tax can, in no view, be considered as laid for the discharge of necessary town charges, for no necessity of incurring the expense exists; and the additional compensation intended is nothing more than a gratuity or bonus, which may well come from individual bounty, but cannot be the subject of legal exaction.

We are satisfied, therefore, that there was no lawful authority to raise the sum in question; and it is important that it should be known that the power of the majority over the property, and even the persons, of the minority, is limited by law to such cases

as are clearly provided for, and defined by the statute which describes the powers of these corporations.

The question is not entirely new, a decision having taken place with respect to the power of parishes to raise money, which is entirely applicable to the case before us, for the powers of towns, as well as parishes, are either entirely derived from some legislative act or defined and limited by the general statutes prescribing the powers and duties of both classes of corporations. In the case of *Bangs v. Snow*, which was cited in the argument, one question which arose respected the powers of a parish to raise by vote a sum of money, and assess it upon the inhabitants, for the purpose of defraying the expense of procuring an act of incorporation; and the court were unanimously and clearly of opinion that the parish had no such authority, and refused to hear argument, saying, it was questioning first principles; for that a parish had power, by statute, to raise money only for the purposes expressed by law, and for expenses incident to such purposes. And it is to be observed that, after specifying the particular objects of taxation, the statute gives the power of raising money for all other necessary parish charges. This doctrine is recognized in a subsequent decision (5 Mass. 547), wherein it is held that the power of raising money in towns and parishes is limited, by statute, to the objects expressly provided for, and such expenses as are necessarily incident. We are entirely satisfied with these decisions, and that the present case is governed by them.

With respect to the unanimity of the vote in town meeting, upon which some stress seemed to be laid by the counsel for the defendants, as evidence of an assent to the vote, this circumstance can have no effect in the present case, as it is agreed that the plaintiff was not present at the meeting. If the maxim, *volenti non fit injuria*, can apply at all so as to take away the remedy, which any of the inhabitants of the town would otherwise have had for the forcible collection of this tax, it must be applicable to those who were present and actually assented. Such a constructive assent as is urged from the common principle, that all the inhabitants are presumed to assent to what is done at a regular meeting cannot be admitted to deprive one of his right, for the presumption is, that towns, when convened, will pass none but legal votes; and to all such the assent of those who are absent may be presumed. Whether the agency of those who were present, in producing the vote, will prevent them from recovering, need not be now decided.

Thus, then, the general question is disposed of; but it is further relied upon in the defense, that the defendants being in the assessment of taxes authorized by vote, servants or ministerial officers, ought not to be subject to an action for the mere execution of an official duty.

It is true, that generally executive officers are not liable to actions for the regular execution of precepts apparently lawful, and which come from an authority which has jurisdiction over the subject. But we cannot view assessors in this light. They are not compellable to assess an illegal tax. They may exercise their judgment on the subjects for which the money appears to be voted, and they may refuse to cause the collection to be enforced, if they deem the tax illegal. If they are not liable to an action for causing an arrest, or the seizure of property, for the nonpayment of an illegal tax, it is difficult to find any remedy for an injured citizen in cases of this nature. The constable or collector is not answerable; because he acts in obedience to a warrant under the hands and seals of the assessors, who have jurisdiction over the subject, and authority to assess a tax, and to issue their warrant; and it would be dangerous to vest such officers with a right to question the legality of the proceedings which precede the assessment.

If an action would lie against the town, it could only be for the money actually received into the treasury, which in most cases of distress would be but a partial remedy. The assessors must, then, be answerable, or there will be a defect of justice. In the cases first cited, the action was against the assessors, and no objection was made on that ground; and it may be also remarked that actions have been uniformly sustained against assessors, when a sum has been assessed which was not within the authority of the town to raise.

It is further objected, that as a part of the money composing this tax was raised for legal purposes, the assessment must be considered so far legal as to support the warrant issued by the defendants, otherwise they may be held to pay in damages for money which lawfully belonged to the town. But, when a part of a tax is illegal, all the proceedings to collect it must be void, as it is impossible to separate and distinguish so that the act should be in part a trespass, and in part innocent. This point may also be considered as settled in the two cases cited, for in both those cases, the greater part of the sum assessed was for lawful purposes. Whether the damages may not be diminished by the jury, in proportion to the sum which shall appear to be

a lawful subject of taxation, may be considered in the inquiry which is yet to be had by the jury.

Whether it would be wise to extend and multiply the objects for which towns may be authorized to raise money, is a question for the legislature, and not for us, to decide. It is sufficient now, that they are limited by law, and some limitation is undoubtedly just and necessary to prevent the minority from being at the disposal of the majority. Whether that defense against the casualties of war, which is not within the ordinary reach of the superintending government, should be committed to the numerous corporations which exist in the state, or should be left to the voluntary and patriotic exertions of individuals, or the retribution of the government, is a question for statesmen, and not for judges, to decide, in the present state of the law; towns now being the creatures of legislation, and enjoying only the powers which are expressly granted to them. It may be well, also, to consider that in case of invasion it is very seldom that any corporate property is put in hazard; the destruction which the enemy may cause, being generally directed against the property of individuals, who are at liberty to operate and dispose of their own money in such manner as shall seem to them best, to avoid the danger.

Defendants defaulted.

"It is well-settled by our decisions, that towns derive all their authority to tax their inhabitants from the statutes; if the authority to tax for a particular purpose is not found there, either in express terms or by necessary implication, it does not exist. If it is to be found, the action of the town in such case is binding and conclusive; and whether the town acted wisely and with proper discretion is not a subject of investigation of revision by this court. It is not necessary to cite all the authorities to this proposition; the earliest and the latest cases lay down this rule: *Stetson v. Kempton*, 13 Mass. 272; *Friend v. Gilbert*, 108 Id. 408; *Higginson v. Nahant*, 11 Allen, 530." *Endicott, J., in Minot v. West Roxbury*, 112 Mass. 3.

SANDFORD v. NICHOLS.

[13 Mass. 236.]

DESCRIPTION IN SEARCH-WARRANT.—A search-warrant, to be valid, must particularly describe the goods to be searched for and the places to be searched.

TRESPASS against Nichols and others, defendants, for breaking and entering the plaintiff's dwelling-house, and taking and carrying away his goods. Plea, not guilty; with liberty to give

special matter in evidence. The defendants admitted the entry and the taking of the articles described, and justified the same on the ground that they, as inspectors of the revenue, having cause to suspect the concealment of certain smuggled goods, sued out a search-warrant, under which the acts complained of were committed. Without showing any complaint in writing under oath, as a foundation for said warrant, the defendants offered the same in evidence, to which the plaintiff objected, but the objection was overruled. The warrant recited that complaint had been made on oath, etc., that "certain goods, wares and merchandise, were lodged or deposited in the houses or stores of Messrs. Thomas Sandford & Co., of Troy, etc., the duties on said goods, etc., not having been paid, etc.," and required the officer to whom it was directed, "to enter into, and make diligent search in the aforesaid houses and stores, for the goods, wares and merchandise, above-mentioned," etc. There was a verdict for the defendants, and a motion for a new trial. The sole question was as to the admissibility of the above-mentioned warrant in evidence.

Holmes, for the plaintiff, cited Constitution of the United States, Amd. art. 6.

Whitman and Morton, for the defendants, cited Bull, N. P. 82; 10 Co. 76; and *Hill v. Bateman*, Str. 711.

By Court, PARKER, C. J. We think that the defendants could have justified the acts complained of by showing a regular warrant from a magistrate having jurisdiction over the subject, without showing that it was founded upon a complaint under oath. It will not do to require of executive officers, before they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty. Such a principle would put a stop to the execution of legal process, as officers so situated would be necessarily obliged to judge for themselves, and would often judge wrong as to the lawfulness of the authority under which they are required to act. It is a general and known principle, that executive officers obliged by law to serve legal writs and processes, are protected in the rightful discharge of their duty, if those precepts are sufficient in point of form, and issue from a court or magistrate having jurisdiction of the subject-matter. If such a magistrate shall proceed unlawfully in issuing the process, he, and not the executive officer will be liable for the injury consequent upon such act.

But it is necessary that the precept under which the officer acts in arresting the body or seizing the goods, and especially in entering a dwelling-house by force, should be lawful on the face of it. Thus, if a precept should command him to break and enter a dwelling-house, without stating any sufficient cause, he could not justify such act under such a precept, because every one is presumed to know that the dwelling-house of another cannot be lawfully forced, unless for purposes specially provided for by law.

The warrant under which the defense in this case is set up, came from lawful authority, and contains an allegation that it was founded on a complaint under oath. But it is deficient in the description of the persons whose houses were to be entered, and of the goods which were the object of search, as prescribed by the amendment to the constitution cited in the argument. The description is, in both points, defective, being general and wholly uncertain, instead of being particular. The house actually searched was the house of Thomas Sandford, not of Thomas Sandford & Company; and "goods, wares and merchandise," without any specification of their character, quality, number, or weight, or any other circumstance tending to distinguish them, cannot be such a particular description as the constitution requires.

It is true, that in case of smuggled goods it may be difficult to describe them with minuteness; nor could this be required. But it would not be difficult to mention the kind of goods to be searched for, or at least to describe them as having been taken out of some certain vessel, so that the officer who should undertake such a search, might not conceive himself at liberty to rifle the house, and disturb the arrangements of the family occupying it.

This warrant, therefore, ought not to have been admitted in evidence, and the plaintiff is, on this account, entitled to a new trial. But, as it does not appear that any articles were actually taken but those which were liable to forfeiture, nor that any violence or injury was done but what was necessary to obtain possession of the goods, it is probable that very small damages will be recovered upon another trial; the parties will, therefore, judge whether it is worth their while to proceed further.

(Afterwards, the plaintiff agreeing to relinquish his costs, the verdict was suffered to stand; the objection to the warrant, which prevailed, not having been made at the trial.)

COMMONWEALTH v. BOWEN.

[18 Mass. 356.]

MURDER TO ADVISE SUICIDE.—If one commit suicide upon the advice of another, the adviser is guilty of murder as principal.

INDICTMENT for murder against the defendant for feloniously, wilfully, and of his malice aforethought counseling, persuading and procuring one Jewett, a felon under sentence of death, to commit suicide.

Morton, for the commonwealth, cited Kel. 52; 1 East's Crown L. 335; 4 Bl. Com. 186.

Bates and Lyman, for the prisoner.

PARKER, C. J., in charging the jury, stated that, considering the similarity between the nature of suicide and the murder of another, and the consistency and uniformity of writers and principles on this particular species of murder, if the jury should find the facts as alleged in the indictment, they might safely pronounce the prisoner guilty. The important fact to be inquired into was, whether the prisoner was instrumental in the death of Jewett, by advice or otherwise. (Here his honor recapitulated the evidence.) The question then is, did this advice procure the death of Jewett?

The government is not bound to prove that Jewett would not have hung himself, had Bowen's counsel never reached his ear. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as, that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given. It was said in the argument that Jewett's abandoned and depraved character furnishes ground to believe that he would have committed the crime without such advice from Bowen. Without doubt he was a hardened and depraved wretch. But it is in man's nature to revolt at the idea of self-destruction. Where a person is predetermined upon the commission of this crime, the seasonable admonitions of a discreet and respected friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage and fix the intention, and ultimately procure the perpetration of the dreadful deed. And if other men would be influenced by such advice, the pre-

sumption is, that Jewett was so influenced. He might have been influenced by many powerful motives to destroy himself. Still the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale.

If you are satisfied that Jewett, previously to any acquaintance or conversation with the prisoner, had determined within himself that his own hand should terminate his existence, and that he esteemed the conversation with the prisoner, so far as it affected himself, as mere idle talk, let your verdict say so. But if you find the prisoner encouraged and kept alive motives previously existing in Jewett's mind, and suggested others to augment their influence, you will decide accordingly.

It may be thought singular and unjust that the life of a man should be forfeited merely because he has been instrumental in procuring the murder of a culprit within a few hours of death by the sentence of the law. But the community has an interest in the public execution of criminals; and to take such an one out of the reach of the law is no trivial offense. Further, there is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence. And you are not to consider the atrocity of this offense in the least degree diminished by the consideration that justice was thirsting for its sacrifice, and that but a small portion of Jewett's earthly existence could in any event remain to him.

The jury found the prisoner not guilty; probably from a doubt whether the advice given him was in any measure the procuring cause of Jewett's death.

The authority of this case is relied on in *Commonwealth v. Mink*, 123 Mass. 422, where it is held that by the law of Massachusetts suicide is deemed criminal as *malum in se*, and although an attempt to commit it is not punishable, yet a person who, in attempting to commit it, accidentally kills another trying to prevent its accomplishment, is guilty of criminal homicide.

WORCESTER v. EATON.

[13 Mass. 371.]

DIED UNDER DURESS.—A deed obtained by duress may be avoided by the entry of the grantor or his heirs within twenty years.

CONVEYANCE TO TOWN CORPORATION.—The inhabitants of a town may take and hold land in their corporate capacity.

ACTION to recover certain premises upon an alleged seisin of the demandants of an estate of freehold therein, and disseisin by the tenant. Plea, the general issue. The demandants, inhabitants of the town of Worcester, claimed under a deed from one Betsey Flagg, conveying the premises to them for the consideration of five dollars, and for the further consideration that they, the said inhabitants of Worcester, should provide for the comfortable support and maintenance of the said Betsey Flagg during her natural life, etc. The tenant claimed under a prior conveyance of the same premises from the said Betsey Flagg to Fisk and Hudson, and an assignment from Fisk and Hudson to the tenant. The deed to Fisk and Hudson was impeached by the demandants as having been obtained under duress, namely, by actual unlawful imprisonment and threats of further imprisonment of the grantor. On this point the case was left to the jury, who returned a verdict for the demandants, having been instructed by the court that the said deed, if obtained by duress, was voidable; that the demandants, claiming under the said Betsey Flagg, might lawfully make this defense, and that the inhabitants of Worcester were in law capable of taking the premises as grantees. The question reserved was as to the correctness of these instructions.

Bigelow and Lincoln, for the tenant, cited *Bac. Abr. tit. Duress, O.*; *Cro. Eliz. 88*; *Moor. 42*; *Russell v. Men of Devon*, 2 T. R. 667; *Riddle v. Proprietors*, 7 Mass. 187 [5 Am. Dec. 35]; *Com. Dig. tit. Capacity, B. 1, 2*; *Id. tit. Pleader, 2 W. 19*; *Stat. 23 Hen. VIII., c. 10*; 1 *Roll. Abr. 862*.

Blake, for the demandants, cited *Co. Lit. 48, a*; 2 *Inst. 483*; *Brooke Abr. tit. Disseisin, 63*; *Hammond v. Barker, Cro. Eliz. 88*.

By Court, PARKER, C. J. The first question submitted by the judge's report is, whether the deed of Betsey Flagg to Fisk & Hudson, the grantors of the tenant, made under duress, as the verdict of the jury has found, could be avoided by her entry, so that her deed, subsequently made to the defendants, passed the freehold to them.

It has been contended that an instrument apparently legal and sufficiently formal, cannot be avoided otherwise than by plea for duress, which renders such instruments voidable, but not absolutely void. The position has been supported by reference to books of authority, and is undoubtedly correct when applied to executory contracts under seal; for on the issue of

non est factum, it is not competent to the defendant to show matter in evidence which goes only in avoidance of the contract; and the reason given is, that the instrument remains the deed of the party, notwithstanding its liability to be avoided, until plea pleaded, so that he cannot in truth say that it is not his deed. But this doctrine cannot apply to contracts executed, such as deeds for the conveyance of land; for in such cases there may be no opportunity for the suffering party to plead the matter which may avoid the deed, for the deed conveys the seisin to the grantee, and he may maintain an action upon that seisin, without making *proferri* of, or declaring upon, his deed. So that if the grantor could not avoid it without a special plea, he would be wholly without remedy. We therefore think that an entry upon the grantee in such a case, with a view to avoid a deed so given, would enable him to maintain his title, he proving that the deed was extorted by duress. This entry must be made by the grantor, or his heirs, within twenty years from the delivery of the deed, or their right of avoiding it will be lost.

It is a general principle, that when infancy is set up in defense against a deed, it must be in the form of a special plea, infancy not making a deed void, but voidable; and yet it is held that an infant, who has conveyed his land by deed of feoffment, or by bargain and sale enrolled, may, by entry, either within age or after, if he has not assented to the conveyance after coming of age, revest the title in himself. The requisition of a plea of infancy is undoubtedly applicable only to executory contracts; and the same distinction will apply to the defense of usury or duress; for in all these cases where the party is sued upon the contract, he must show by plea that, although he made the deed, it ought to have no force or effect in law. But when title is claimed under a deed which, of itself, has executed and finished the contract, the defendant may show in evidence the facts which authorize him to avoid the deed.

Until a deed so made is avoided, no subsequent conveyance by the grantor can be good, because he would not be seised of the land, and none but himself or his heirs can set up a right to avoid a deed for infancy or duress, these being matters in defense, which he may waive if he see fit, so that the title will remain good to the grantee by virtue of such deed, until the grantor shall lawfully disaffirm it. He can do it only by entry; but, having entered, his subsequent deed, accompanied by proof of facts tending to avoid the first, will convey a title.

In the case of *Hills v. Eliot*, 12 Mass. 26 [*ante*, 26], it was held

that the second assignee of a mortgaged estate might, under the issue of *non disseisvit*, prove that a prior assignment was made upon a usurious consideration, and so was void; and this because, not being a party to the first assignment, he might not know the facts which rendered the instrument of assignment void, seasonably for pleading them. This was an executory contract, the assignment showing, upon the face of it, that it was given as security for a debt.

It has been objected that, although the entry of Betsey Flagg might have availed her against Fisk & Hudson, her grantees, while they remained seised of the land, yet that it ought not to avail against the tenant who was a *bona fide* purchaser, ignorant of the defective title of his grantors. But we know not how to limit the right of one, who has been deprived of his estate by violence, from reclaiming it, into whose hands soever it may have come, provided public declaration of his intention be made by entry within the lawful time of entry.

The difficulty is as great when a title is purchased of one who holds only by grant from an infant, or who has obtained a deed by imposition, or advantage taken of the imbecility or want of capacity of his grantor. In all such cases the maxim, *caveat emptor*, is applicable, and the purchaser must secure himself by covenants, as in other cases of defective title.

In the argument for the tenant it has been urged that the acknowledgment of the deed by the grantor before a justice of the peace after the execution of it, prevented her from avoiding it on account of duress; and it was likened to the case of a deed of bargain and sale, in England, which has been acknowledged in order to be enrolled.

If there be no difference between the acknowledgment required by our statute and that which is required in England preparatory to enrollment, the grantor would be estopped here as he seems to be there, to aver duress. But there is a material difference in the mode of acknowledgment in the two countries and in the solemnity attending it. In England the acknowledgment must be made before some judge or some court of record, and the practice is to make actual inquiry as to the circumstances under which the deed was executed. Here the acknowledgment is taken before a common magistrate, and it is seldom that any inquiry takes place. And our legislature seems to have considered the fact of acknowledgment as of very trivial importance. For in the same statute which makes acknowledgment one of the formalities, it is provided that when the grantor

shall refuse to acknowledge the deed, the testimony of the subscribing witnesses that it was voluntarily executed shall have the same force as if the grantor had acknowledged it. The justice is not authorized to inquire into the reasons of the refusal; nor can he receive any evidence against the testimony of the subscribing witnesses, who may, and most probably would be confederates with the grantee, or at least aiding and assisting him, in case of a deed obtained by duress. It was not intended by the legislature to deprive the grantor of the right to show that he never consented to the deed, by this summary process before a justice, nor can we suppose that its equivalent, the acknowledgment, was intended to have this effect.

It is not an extravagant supposition that where a party has been so far overcome by restraint of his person or by his fears as to execute a deed without any lawful consideration, the same influence may continue until after its acknowledgment; and threats of renewing an imprisonment or of inflicting personal mischief, if the grantor shall not perfect the conveyance by acknowledging it before a magistrate, may be as effectual in producing the acknowledgment as similar practices had been in coercing the execution. A voluntary and free acknowledgment before a disinterested and judicious magistrate, especially if there were any considerable interval between the execution and acknowledgment, would be, in most cases, strong if not conclusive evidence with a jury against the allegation of duress. But it can only be evidence, and cannot estop any inquiry into the subject.

It is said that a deed made under duress cannot acquire force afterwards by a voluntary delivery after the party is at large. There is certainly as much reason why it should not become operative merely by an acknowledgment before a justice of the peace. Nor is it like the case of a feoffment with livery and seisin, because the notoriety attending this mode of conveyance gives full opportunity for a party who would avoid it by suggestion of duress, to claim protection and resist the coercion of the other party. We must suppose that the improbability of duress under the circumstances with which the deed in this case appeared before the jury was urged upon their consideration, but was not thought sufficient to countervail the proof offered by the demandants.

With respect to the capacity of the demandants to take by purchase and to hold real estate, we cannot deny to towns such right, since by the immemorial usage of the country it appears to have been an incident to their corporate powers. As early

as the year 1679, provision was made by a colonial act respecting lands, woods, etc., owned by towns in their corporate capacity; and authority was given to the inhabitants, by vote of the major part, to dispose of the same by grant of lots for settlement: *Ancient Charters, etc.*, 195; and it is well known that many towns at this day are owners of real estate, which they hold in their corporate capacity, other than such as may be necessary to erect school-houses and other public buildings upon.

Whether the inhabitants of a town can be assessed, to raise money for the purchase of lands, to be used for any other purpose than the execution of some lawful requisition, is a different question. But there seems to be no reason why there may not be a gift or a devise to the inhabitants.

We do not determine, that the acceptance of a deed by the overseers or other officers of the town, the consideration of which imposes upon the inhabitants any expense or burden, will create a contract on the part of such town, or that the grantor, in such case, may not avoid a deed of which such obligation is the only consideration. But, in this question, the tenant has no lawful interest; because such a deed is good, until avoided by the grantor himself, or by some one privy in estate.

The deed set up by the tenant being wholly avoided, he must be considered as a disseisor; and, if the demandants' title were not established, no new force would be given to that deed. The demandants became lawfully seized, on the delivery of the deed to them by Betsey Flagg, and will remain so until the estate expires, or is transferred by them, or is resumed by the grantor, in consequence of her choosing to avoid this deed as well as the other.

Judgment on the verdict.

COLBURN v. RICHARDS.

[13 MASS. 420.]

EASEMENT—ANCIENT MILL.—One owning an ancient mill may lawfully go upon the land of another to remove an obstruction, erected across the stream for the purpose of irrigation, which prevents the mill from working.

TRESPASS for breaking and entering plaintiffs' close and destroying a certain water gate, etc.

The case was submitted upon an agreed statement of which the following were the material facts: The plaintiffs were the

owners of a meadow, through which ran an ancient water-course to the defendant's grist-mill, three quarters of a mile below. The mill had been built about fifty years and the flow of water to it had always been unobstructed, until about seven years prior to the commencement of this action, when the plaintiffs, for the purpose of irrigation, erected a dam and placed a water-gate across the stream in their said meadow. The result was that the defendant's mill was rendered almost useless for a great part of the year, the flow of water being nearly entirely stopped by the shutting down of the plaintiffs' gate. On the day named in the declaration, the plaintiffs having shut down their said water-gate, the defendant went upon the land and took up and removed the said gate, which constitutes the trespass complained of.

Worthington, for the plaintiff, cited *Weston v. Alden*, 8 Mass. 136; *Sullivan on Land Titles*, 273; 6 East, 218; Day's edition.

Richardson, for the defendant, cited Com. Dig., tit. Action upon the case for nuisance, A.; *Luttrell's case*, 4 Co. 86; 1 Wils. 175; 9 Mass. 316; 6 East, 218.

By Court, PARKER, C. J. In the case of *Hodges v. Raymond*, cited from 9 Mass. 316, the common law doctrine is recognized; one having a right to a water-course to carry his mill, may justify entering upon the land of one who has erected an obstruction to remove it. That is precisely the case of the defendant in this action, unless the purpose for which the dam was erected by the plaintiff, namely, to irrigate and fertilize his meadow, forms an exception to the general rule of law.

According to the case cited from 1 Wils. 175, the plaintiffs had no right to adopt any new measure to irrigate their land, the consequence of which would be injurious to the privilege below. But it has been urged that the case of *Weston v. Alden* is an authority in point, to establish the right claimed by the plaintiffs. There is, however, this difference between that case and the one now before us. In that case, there was no obstruction to the course of the water; sluices were made for it into the land of the defendant in that action, and the water, after washing his lands, still passed down the natural channel. Nor does it appear in that case, that the plaintiff had acquired a right by prescription to the use of the stream to carry works, which had been erected and maintained at expense, but he had merely enjoyed the natural benefits of the stream, without any labor or expense of his own. In the case before us, the whole

stream was stopped, or, at least, so much of it as to render the defendant's mill entirely useless. There is no principle upon which this can be justified, and we think that the defendant had a perfect right to remove the gate which occasioned him the injury. The plaintiffs must be called.

Plaintiffs nonsuited.

FLINT v. SHELDON.

[13 Mass. 463.]

PAROL EVIDENCE TO VARY DEED.—A deed, absolute on its face, cannot be avoided or controlled by parol proof of usury, or of any condition or trust not expressed in such deed.

WRIT of entry for certain land on the seisin of the demandant, within thirty years, and a disseisin by the tenant. At the trial the demandant produced a deed of the demanded premises, duly executed to him by the tenant, Sheldon, for a valuable consideration therein expressed, and with covenant of general warranty. He also produced an indenture of lease of the premises, for one year, from himself to the tenant, of the same date with the deed. The tenant, on his part, did not deny the execution of his said deed to the demandant, but offered to prove, by parol evidence, that the said deed was executed in consideration, and to secure the repayment, of a loan from the demandant to the tenant, of three hundred dollars, for one year, with forty dollars for interest, and upon an agreement of the said demandant to reconvey the said premises upon the payment of the said sums, and for no other consideration whatever; and thereupon claimed that the said deed was founded upon a usurious contract, and therefore void. The evidence was rejected, and there was a verdict for the demandant, subject to the opinion of this court as to the admissibility of said evidence upon a motion for a new trial.

Bigelow, for the demandant.

Prescott, for the tenant, cited Stat. 1783, c. 55; 1 Hawk. P. C., c. 82, sec. 21; Bac. Abr., tit. Usury, E.; *Thomas v. Cleaves*, 7 Mass. 361.

By Court, JACKSON, J. The demandant, to prove his seisin of the demanded premises, produced a deed of the tenant purporting to convey the same to him; which was proved and admitted to have been duly executed, acknowledged and registered.

This evidence was *prima facie* sufficient to maintain the issue for the demandant. Such a deed, by force of our statute of conveyances, actually passes the whole estate which the grantor had in the premises, without any other act or ceremony whatever; and the grantee becomes, *ipso facto*, seized of all that the grantor could lawfully convey.

The tenant attempted to prove, in his defense, that this deed was originally void, and, of course, that nothing passed by it to the demandant. There is no doubt that any legal evidence to this point would be admissible under this issue. The deed relied on by the demandant not being set forth nor mentioned in the declaration, as it could not regularly have been, the tenant could not plead any matter in avoidance of it; and of course he may give such matter in evidence under this general issue. The fact on which the defendant relies for avoiding the deed is, that it was made upon a usurious contract; or, to state the ground of defense more precisely, that this deed was, in the language of the statute of usury, "a contract, mortgage or assurance, made for the payment of money lent upon or for usury, whereupon or whereby there was reserved or taken above the rate of six per cent. by the year." If this point were duly proved it would certainly avoid the deed.

In making out this defense the first step is, to prove that the deed was "a mortgage, or assurance made for the payment of money lent." Unless it was so, the question of usury does not arise. The deed itself does not purport to be of that description. On the contrary, it is in the usual form of deeds for the absolute conveyance of real estate. It is perfectly clear, intelligible, and unambiguous; and if it expresses the true intent and meaning of the parties, it certainly is not a mortgage, nor an assurance of any kind for the payment of money. There was no other deed or writing between the parties tending in any manner to control, explain or alter this legal effect and operation of the instrument in question.

The tenant then offers parol evidence to prove that the conveyance, although absolute on the face of it, was not, in truth, an absolute conveyance; that the contract or agreement upon which the deed was made was not an agreement for the purchase and sale of land, but for the loan and repayment of a sum of money; and that the deed was made upon an express condition that it should be void, or that the grantee should reconvey the granted premises upon the repayment of the money within a certain time. On stating the point in this manner, and

omitting for the present all consideration of the rate of interest at which the money is supposed to have been lent, no one would doubt that such evidence is inadmissible. An agreement to that effect, even if made in writing and signed by the grantee, would not, unless it was under seal, operate as a defeasance of the deed, nor in any manner affect the absolute title which the grantee had acquired in the land. But such an agreement, if not reduced to writing, would have no effect whatever. It would neither make the conveyance a conditional one, nor would it bind the grantee to reconvey the premises, or to account for the proceeds, or the value of the land. The admission of such evidence would violate the fundamental principle recognized by this court in the case of *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150], "that deeds and specialties cannot be explained or varied in their signification by parol evidence, if the terms made use of in the instrument are capable of a sensible explanation of themselves."

The question then, is, whether the rate of interest, at which the money is supposed to have been lent, makes any difference in such a case. The parol evidence would tend to explain or vary the import and effect of the deed as much if the loan were proved to be at the rate of seven per cent. as if it were at the rate of six. The statute of usury has not rescinded, nor in any manner modified the rules of evidence before mentioned. The intention of the legislature was to render void every usurious contract; but they have left it to be ascertained, as in other cases, whether there is a contract for the loan and repayment of money before the provisions of the statute can apply. The tenant in the case at bar, has not proved, nor offered any legal evidence to prove that the deed in question was made upon a contract or agreement for the loan and repayment of money. If the deed is truly what it purports to be, the statute of usury does not affect it, and the tenant is not permitted to prove it to be otherwise by parol evidence, which would tend to control, explain, or alter its clear and manifest import and effect.

There is another view in which this case presents itself, and which leads to the same result. The evidence offered by the tenant would not, if admitted, have proved that his conveyance was a mortgage. There was no condition in the same deed, nor in any other; and there was no mutuality in the supposed contract, inasmuch as the tenant was under no obligation to repay the money said to have been lent. The evidence, then, would tend only to prove that the conveyance was made in trust; that

the grantee should reconvey the land to the grantor, on the performance of a certain condition on his part. But such trusts, by the express provisions of our statute of conveyances, must be manifested and proved by some writing signed by the party, or else they are utterly void, and of no effect: Stat. 1783, c. 37, sec. 3. The nature and effect of the trust would make no difference in the application of this statute. If the tenant had offered to prove, by parol testimony, that his conveyance was made without any valuable consideration, and in trust that the grantee would permit him to receive the rents and profits, and upon his death would convey the premises to his heirs, or to whomsoever he should appoint, or if the trust had been that the grantee would reconvey the premises to him upon payment of a certain sum of money, with lawful interest, the defense, in either case, would certainly have appeared not less meritorious and equitable than that which was attempted on this trial. Yet such evidence would most clearly be inadmissible. Of whatever description the trust may be, excepting only such as result by implication of law, the statute is imperative that it shall not be proved, unless by some writing signed by the party.

The consequences that would flow from the admission of such testimony serve to confirm the opinion which we have thus drawn from the statute of conveyances, and the general rules of evidence. If testimony of this kind were admissible, there would be no security in any conveyance that could be made, either of real or personal estate. Though the conveyance were perfectly fair and legal, and accompanied with all the usual solemnities and documents, still the grantor might always defeat it, by procuring evidence of a condition, or trust, not apparent upon the deed. It is true, that the maker of a bond or mortgage may, in like manner, procure evidence of usury in the contract, when, in truth, there was none. But, in such case, the other party is originally on his guard, and may, by proper precaution, prevent or defeat such an attempt. When a man loans money and takes a mortgage or other security for the repayment of it, as he understands from the first that he may be compelled to bring an action upon the contract, he will furnish himself with the necessary evidence to prove it. But, when one is bargaining for the purchase of a bale of goods, or a piece of land, he is not thus on his guard. He does not think of taking witnesses to the whole transaction; because, if he makes the purchase, it is understood to be sufficiently proved

by the deed of conveyance, or by the bill of parcels and delivery of the goods. But even if the purchaser should be supposed to take the same precautions as the mortgagee, still he may, without any fault or laches on his part, lose all his evidence, before he is aware that it will be wanted. When a man has lent money, it is his own folly if he neglects to enforce the payment of it until all his witnesses are dead. But, when one has made an absolute purchase, he has only to take possession of the land or the goods purchased, and can take no measures to prove his title in a course of law. The action, if any, is to be brought by the other party, or, at least, the first step is to be taken by him, in case of any dispute concerning the title; and he may purposely delay it, until all those who might detect his fraud can no longer be produced against him. If such evidence is admissible at all, it may extend back to an indefinite length of time, when not prevented by some statute of limitations. A man, therefore, who had made a bill of sale of his ship ten years ago, might take possession of it to-day, in whose hands soever it should be found, and, on proving that his sale was made on an usurious agreement, he would be entitled to hold the ship. This right, if it exists at all, would endure as long as the chattel continued in existence.

As to real estate, the grantor or his heirs, by bringing a writ of right, might go back forty years. On proving usury in any conveyance within that time, by the demandant or his ancestor, he would recover the land against the grantee, or any assignee of his, however remote. For if the statute of usury applies to the contract, it renders it merely void. It is considered, in all respects, as if it had never existed. It would not, therefore, be enough, that a purchaser of land knew his own contract to be legal and valid; he must be certain that every successive sale of the land for forty years preceding had been likewise untainted with usury. All the common *indicia* of property would be of no use to him. The deeds might all be perfectly regular. The possession might have uniformly accompanied this apparently good title. The former owner might have lived in the neighborhood for thirty-nine years, and have seen, during all that time, the possession thus accompanying the successive conveyances, without suggesting a doubt of the title; and after all this, he might recover the land against the last purchaser, by parol evidence of a secret negotiation, made forty years before, between himself and his original grantee.

If, in the present case, the conveyance to the demandant had

been in form a mortgage, he would, after a judgment, or an entry in pursuance of the statute, and a peaceable possession for three years, have held the land, without any possibility of having his title impeached upon an allegation of usury in the original conveyance. But when one has made a *bona fide* purchase of land, and has taken an absolute conveyance, not less than forty years' quiet possession would secure him or his assigns against such an attempt to destroy his title.

It makes no difference whether the vendor in such a case brings an action against the purchaser to recover the lands or goods sold, or regains the possession in some other manner, and so causes the purchaser to bring the action against him. In either case he is virtually the *actor* or plaintiff. He is reclaiming the goods or lands which he has sold, relying on an alleged defect in the conveyance. The object of his suit or claim is not to enforce the performance of an executory contract, but to rescind and annul a contract which has been executed. Even when goods have been pawned to secure the payment of money lent on an usurious contract, the former owner is not permitted to treat the conveyance as merely void; and he cannot recover his goods without paying or tendering the money really lent to him with the lawful interest: *Fisroy v. Gwillim*, 1 T. R. 153.

The opinions now expressed are not opposed by any authorities that we are apprised of, unless it be the general proposition contained in many different books, and copied successively from one into another, that a fine levied, and even a judgment recovered in pursuance of an usurious contract, may be avoided by an averment of the corrupt agreement: 3 Co. 80; Jenk. Cent. 254; Vin. Abr. Usury, pl. 3, 4; Bac. Abr. Usury, E; 1 Hawk. P. C. 82, sec. 50; and it may be fairly inferred that a deed executed in the common form for the conveyance of land, may be as easily avoided for the same cause. It remains, then, to consider under what circumstances a fine or judgment may be avoided.

As to a fine, in examining the books before mentioned, and tracing the proposition to its source, we find but one adjudged case on the point, that is the case of *Dodd v. Ellington*, 1 Roll. 41; S. C., Brownl. & Gouldsb. 191 (reported under the name of *Burclacy v. Ellington*). It was an action of replevin, and the plaintiff, in his replication to the avowry, set forth an indenture of bargain and sale between himself and the defendant and his wife, by which the defendant and his wife granted to the

plaintiff certain land in fee, and fine levied accordingly. The defendant had *oyer* of the indenture, upon which it appeared that the grant was upon condition; and he then pleaded the statute of usury, alleging that the plaintiff, in addition to the lawful interest secured by the contract, had also the profits of the land. The plaintiff answered that it was part of their agreement that the defendant should receive the profits of the land until breach of the condition; upon which the defendant demurred. The defendant contended that as the land was conveyed to the plaintiff, the right to take the profits followed of course, and that therefore he could not aver a parol agreement that the defendant should take the profits. But the court thought the surrejoinder good, and gave judgment for the plaintiff. In this case no question was made whether the defendant might aver the condition upon which the conveyance was made, and no such question could arise, because the condition was expressed in the indenture itself. It seems to have been a mortgage in fee, of the kind commonly used in this state. The mortgaged premises being originally the property of a *feme covert*, a fine was necessary to perfect the conveyance. But this fine, although unconditional in itself, was made according to the indenture, and was undoubtedly mentioned in it. The indenture was to lead the uses of the fine, and both together made but one conveyance. This case then, at most, would prove that a mortgage, in which a fine is levied as part of the assurance to the mortgagee, may be avoided for usury as well as if made by any other mode of conveyance.

As to avoiding a judgment by an averment that it was founded upon an usurious contract, it is to be observed that the books cited speak of a judgment suffered in pursuance of an usurious contract, and when it is part of the agreement to have a judgment. On this point, also, we find but one adjudged case, that of *Harning v. Castor*, which is briefly stated in the argument of the *Earl of Oxford's case*, printed at the beginning of 1 Rep. in Chanc. This report gives no more of the case than is stated in Viner, in the place before cited, and it must undoubtedly refer to a judgment by confession, on a bond and warrant of attorney. Such a judgment, in the English practice, is frequently subject to a defeasance on the payment of a smaller sum, like a bond or mortgage; and one object of it, in every instance, is that the creditor may have a kind of lien on the lands of the debtor, as an additional security for the debt. On this account, it may perhaps have been considered like a mort-

gage, or any other common assurance, made on an usurious contract, and liable to be avoided by an averment of the usury in an *audita querela*, or in a plea to a *scire facias* on the judgment. This case, then, would only prove that when a judgment is suffered as part of the assurance or security for the future payment of money lent on an usurious contract, the judgment may be avoided in like manner as any other security taken in such a contract.

But even in this restricted sense, the case of *Harning v. Castor* is not law, and it has been repeatedly overruled. It is now well settled that the debtor cannot avoid the judgment by any such plea or averment; although the courts may, in their discretion, order the warrant of attorney in such case to be delivered up, and the judgment to be set aside: Cas. Temp. Hardw. 233; Cowp. 727; 1 Bos. & P. 270. On the other hand, if the case of *Harning v. Castor* is to be understood of a judgment rendered in *invitum* in the usual course, the position is still more clearly incorrect. It is contrary to the established principle, which applies to all judgments of the kind last mentioned, that a judgment-debtor shall plead nothing to a *scire facias*, nor aver anything in an *audita querela*, which he might have pleaded in the original action. This point has been repeatedly decided in reference to this very defense of usury, in the English courts: Cro. Eliz. 25, 588; Gouldsb. 128; 1 Sid. 182; Cas. Temp. Hardw. 233; and the same principle has been recently recognized by this court: *Thatcher v. Gammon*, 12 Mass. 268.

There is manifestly nothing in either of these two cases, when rightly understood, to show that a deed, purporting to contain an absolute conveyance of land can be avoided or controlled in its construction by an averment, or by parol evidence, of a condition or trust not expressed in the deed. We are satisfied, for the reasons before given, that the evidence offered in this case was rightly rejected.

Judgment according to the verdict.

GREEN v. KEMP.

[13 MASS. 515.]

MORTGAGE—USURIOUS CONSIDERATION.—A mortgage upon usurious consideration is void only as against the mortgagor and those lawfully holding under him, and cannot be avoided by a purchaser of the more equity of redemption.

MORTGAGOR'S REMEDY AFTER CONDITION BROKEN.—A mortgagee may declare generally on his seisin and have judgment for possession, as well after as before condition broken, either against the mortgagor or his assignee.

THE opinion states the case.

Hoar, for the defendant.

J. Prescott and Lawrence, for the tenant, cited *Erskine v. Townsend*, 2 Mass. 496 [3 Am. Dec. 71].

By Court, *WILDE, J.* This is a writ of entry; the demandant counting generally on his own seisin and a disseisin by the tenant. The title set up by the tenant is derived from one Isaac Woods, who, in April, 1808, conveyed the demanded premises in mortgage to the demandant, and in April, 1810, sold the equity of redemption to the tenant. This latter declines redeeming the land, and rests his defense on the supposed invalidity of the demandant's title and on an objection to the form of the action.

The objection made to the demandant's title is, that the mortgage deed was made on an usurious contract, the evidence of which was offered at the trial and was rejected by the judge. The first question now to be determined is whether this evidence was rightly rejected.

Although by the statute of 1783, c. 55. sec. 1, all mortgages on usurious considerations are declared to be utterly void, yet it never could have been intended that a stranger might enter on the mortgage or commit a trespass on the land and justify himself under the statute, when all parties interested in the title should be disposed to acquiesce in the contract. The statute must have a reasonable construction, and in conformity to its general object, which was to protect debtors from the enforcement of unconscionable demands. A mortgage on a usurious consideration is therefore void only as against the mortgagor and those who may lawfully hold the estate under him: *Carter v. Claycole*, Bac. Abr. Title, Usury, E.; citing Leon. 307, pl. 427; Bull N. P. 224; *Bearce v. Barstow*, 9 Mass. 48, [6 Am. Dec. 25.]

On this construction, if the tenant had purchased the land he might avoid a previous usurious mortgage, although he had notice of such mortgage before the purchase. But the tenant has no title in the land before redeeming. He has purchased only the right to redeem; and if he will not avail himself of this right, which is the basis of his title, he cannot hold the land; and, having no title in the land, he cannot be permitted

to avoid the mortgage by plea or proof of usury. The principle contended for by the tenant's counsel would serve to encourage fraud and injustice rather than to restrain the taking of excessive usury.

The objection to the form of action is, that the demandant has not declared on the mortgage; and this objection is supposed to be supported by the case of *Erskine v. Townsend*, in which it is said, "That it had been settled by this court formerly, that if he, the mortgagee, declare generally, and the mortgagor shall plead in bar that the mortgagee is seised as tenant in mortgage, the condition of which is broken, the action shall be barred." The grounds of this opinion are not stated, and it is not easy to perceive on what fair construction of the statute it can be supported. The object of the statute is to provide for foreclosing the mortgage, and to give a remedy in equity to the mortgagor. It is admitted that before condition broken the mortgagee may have judgment for possession at common law; and we see no good reason why he may not have the same judgment after condition broken, when the object of the suit is not to foreclose the mortgage. Such a judgment cannot be injurious to the interests of the mortgagor, for he may redeem at any time; and if the mortgagee should refuse to receive the money, he may be considered in possession for condition broken, at the election of the mortgagor, so as to entitle him to his bill in equity: *Pomeroy v. Winship*, 12 Mass. 519 [*ante*, 91].

But, if we held this point doubtful, or were satisfied that the decision relied upon for the tenant is correct, it would by no means follow that a mortgagee must be held to declare on his mortgage deed, against an assignee of the mortgagor. Such a principle might subject the mortgagee to unnecessary inconvenience. He might not have it in his power to prove the assignment, or he might be ignorant that the tenant claimed as assignee. But there can be no inconvenience in requiring the assignee to set forth his title in his plea, if he would avail himself of it to restrict the demandant to a conditional judgment.

The defense also must fail on another ground. The plea of *nul disseisin* puts in issue the title to the land; and as to that there can be no question.

If the tenant had intended to avail himself of the objection made to the form of the action, he should have pleaded the mortgage, and have alleged that the condition had been broken before the commencement of the suit. As he has not so

pleaded, it is very clear that the demandant is entitled to judgment.

Judgment on the verdict.

A recent author says: "It has sometimes been held that the defense of usury is so exclusively personal; that it could not be made by any one but the mortgagor; that a subsequent incumbrancer or purchaser cannot set it up. But this doctrine has been generally abandoned, and in its place has been adopted the rule that not only the mortgagor, but any person who is seised of his estate and vested with its rights, may interpose this defense, although a mere stranger cannot. Thus, a voluntary assignee of the mortgagor for the payment of his debts may set up usury in the mortgage. So may a judgment or execution-creditor of the mortgagor, or a purchaser of the equity of redemption, unless he has assumed the payment of the mortgage, or bought subject to it, or a second mortgagee." 1 Jones on Mortgages, sec. 644.

The *ratio decidendi*, holding that a purchaser of the equity of redemption cannot set up the defense of usury, is well and clearly stated by Thomas on Mortgages, 212, who says: "The rule under which the defense of usury is denied to one who has purchased the mortgaged premises from the mortgagor, subject to the mortgage, is founded upon the supposition that on the purchase an allowance was made out of the purchase-money, with which to redeem the property purchased from the incumbrance; and that the purchaser ought not, under such circumstances, to avail himself of a statute not intended for his benefit. If the subsequent purchaser of the equity of redemption were allowed to set up usury as against the mortgage, it would hold out no relief to the borrower, but would only be transferring his money from the pocket of the lender to the holder of the equity of redemption, and that too in open violation of his own valid contract."

It is on the ground, therefore, of an estoppel, that this right is denied the purchaser of the equity of redemption, for in purchasing from the mortgagor, he recognizes the validity of the mortgage: See, citing the principal case, *Fletcher v. Stone*, 3 Pick. 253; *Housatonic Bank v. Martin*, 1 Met. 307; *Russell v. Dudley*, 3 Id. 149; *Gerrish v. Mace*, 9 Gray, 237. But should the purchaser acquire the mortgagor's title, by sale under judgment, he would be allowed this right to set up the usury: Thomas on Mortgages, 211.

OYSTED v. SHED.

[18 MASS. 520.]

ARREST—DWELLING-HOUSE PROTECTS WHOM.—A dwelling-house is a protection from arrest on civil process not only to the occupant, his children and domestic servants, but also to his permanent boarders or lodgers.

TRESPASS for breaking and entering the plaintiff's dwelling-house, taking and carrying away his goods, etc.

The defendant justified as deputy sheriff, and the other defendants, as his assistants, pleaded severally. The justification pleaded was that the officer, having a *capias* against one Chase, attempted to arrest him, when he fled into the plaintiff's dwell-

ing-house, and that the plaintiff, upon request, having refused admission to the officer, the latter opened a window, through which he entered the house and made the arrest with the aid of the other defendants, whom he summoned to assist him. The replication alleged that Chase was and for a long time had been a "lodger and boarder" in the house, and "was quietly taking his repose there as one of the family" when arrested. It then traversed the flight of Chase. The defendants demurred specially to the replication, for causes stated in the opinion.

Fuller, for the plaintiff.

Stearns, for the defendant.

By Court, PARKER, C. J. The question submitted to us in this case is, whether the plaintiff's replication to the third plea in bar is sufficient, in form and substance, to avoid the defense stated in the bar. (Here his honor recited the substance of the plea and replication.)

To this replication there is a special demurrer; and the principal cause of demurrer relied upon is, that it is bad in substance; because, after alleging a new fact, which of itself would be an answer to the bar, if not traversed, there is a traverse of a material fact alleged in the bar, namely, the flight of Chase into the house when the officer was about to arrest him.

If this cause is well assigned, then undoubtedly the replication is bad; for the result of an examination of all the authorities upon the subject by Sergeant Williams, in his notes to Saunders, is that when the plea confesses and avoids the material facts in a declaration, there must not also be a traverse; because it shall not be in the power of a party, by adding a traverse, to prevent the other party from denying the facts which avoid his title: 1 Saund. 22, note 2; Id. 209, note 8. If this doctrine is applicable to the replication to a plea in bar, as well as to the answer to a declaration, and there seems to be no reason why it should not be, then the inquiry is only whether the facts alleged by way of inducement to the traverse are of a nature to avoid the defense set up in the bar; and if they are, the taking a traverse upon another fact material to the cause is, according to the authorities, bad.

The fact alleged in the replication is, that Chase was quietly reposing in the plaintiff's house, being a lodger and boarder there, when the officer entered. Is this of itself an answer to the bar, which avers that the officer being about to arrest Chase, he fled into the house?

This depends upon the relation which Chase had to the family of the plaintiff; for it is very clear that, if the plaintiff, or one of his family, had fled into the house to avoid an intended arrest, the officer would have been liable in trespass for entering the house forcibly in pursuit of him. It would not be so, if an arrest had been actually made, and the flight had taken place upon an escape.

The authorities do not clearly show what persons are considered as belonging to the family of a householder, and so having a right to protection under his castle. The very learned judges, Foster, Hale and Coke, in treating of the inviolability of dwelling-houses, say that the outer doors or windows shall not be forced by an officer, in the execution of civil process against the occupier, or any of his family, who have their domicile or ordinary residence there; but that the house shall not be made a sanctuary for other persons; so that, if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, the house is not his castle; and the officer may break open the doors or windows in order to execute his process; and if one, upon escape after an arrest, flee into his own house, it shall not protect him, etc.: Foster's Crown Law, 820; 2 Hale, 117; 1 Id. 459; 5 Co. 93. According to these principles, not only the children and the domestic servants of the occupier are of his family, and so entitled to protection, but also permanent boarders, or those who have made the house their home, may properly be considered a part of the family.

The purpose of the law is, to preserve the repose and tranquillity of families within the dwelling-house; and these would be as much disturbed by a forcible entry to arrest a boarder or a servant, who had acquired, by contract, express or implied, a right to enter the house at all times, and to remain in it as long as they pleased, as if the object were to arrest the master of the house or his children. A stranger, or perhaps a visitor, would not enjoy the same protection; for, as they have acquired no right to remain in the house, if the occupant should refuse admission to the officer, after his purpose and his authority were made known, the law would consider him as conspiring with the party pursued, to screen him from arrest, and would not allow him to make his house a place of refuge.

The allegation, then, in the replication that Chase was a boarder in the house, and quietly reposing there as one of the family, would have avoided the material allegation in the bar,

that he fled into the house to avoid an arrest; for this is what he had a right to do, and being within, he was safe against arrests, if the house was kept shut. This being a new fact, ought to have been pleaded with a verification; but, instead of that, the plaintiff traverses a fact in the bar, and thus precludes the defendant from denying and putting in issue the right of Chase to retire to the house, and protect himself there against a forcible entry and arrest.

The plaintiff, by alleging the matter in his replication before the traverse, rendered the fact traversed wholly immaterial; for, if Chase was a boarder, and one of the family, his having fled from the officer, to avoid an arrest, gave no right to the officer to break the house. The case, therefore, comes completely within the principle laid down in the authorities cited, and the replication is, for that cause, bad.

It was suggested in the argument, that the defendants, having averred that they entered the house in aid of the officer after the door was open, being required thereto, they were not trespassers, because the officer, being in the house, had a right to arrest or attach property, notwithstanding the unlawfulness of his first entry. If this would constitute a defense of itself, if properly pleaded, which we are not willing to deny—as men may innocently, and from a sense of duty, go in aid of officers, seeing them actually within the house, and being ignorant of the manner in which they entered—we think that the ignorance of previous facts ought to be averred, so as to give opportunity to the plaintiff to traverse it; which is not done in this case, and so would not avail the defendants, if the replication had been sufficient.

Replication adjudged bad.

WIGGIN v. AMORY.

[14 Mass. 1.]

BARRATRY.—To constitute barratry on the part of the master of a ship, the act must be either fraudulent or criminal.

ASSUMPT on a policy of insurance, in the usual form, on the cargo of the ship *Volant*, on a voyage from France to the United States. The facts were: While at Bordeaux, the master of the *Volant*, by the advice of the consignees of the vessel and outward cargo, and upon consultation with the supercargo, took out a commission as a letter of marque, and increased the

armament of his ship, with the understanding that it was solely for the purpose of defense on the homeward voyage, war then existing between England and the United States. His orders were to return to the United States as expeditiously as possible. When three or four days out from France, the master descried a strange vessel, which was supposed to be standing for the *Volant*, and attempted to avoid her. On a nearer approach, discovering her to be weaker than his own ship, he put about and captured her and sent her to France, where she was condemned as a prize. This occasioned a delay of two or three hours, when the *Volant* proceeded on her way. She was afterward captured by the British and taken to Halifax, where she was condemned as a prize. One of the counts in the declaration was for a loss by the barratry of the master in stopping and making the capture referred to, and upon this count the present trial was had. There was a verdict for the defendant, and a motion for a new trial, on the ground of misdirection by the judge, as stated in the opinion.

Shaw, for the plaintiffs, cited Marsh. B. 1, c. 13, sec. 6; 4 T. B. 33; *Moss v. Byrom*, 6 Id. 83; *Vallejo v. Wheeler*, Cowp. 143; Lofft, 645, S. C.; *Earle v. Rowcroft*, 8 East, 126; *Kendrick v. Delafield*, 2 Cai. 67; *Wilcox v. Union Ins. Company*, Marsh. 534; Condry's ed.

Amory, for the defendant.

By the Court, PARKER, C. J. In this case, the verdict, which had been returned for the plaintiffs, having been set aside and a new trial granted, on the ground that the act of stopping to man a prize, which act occasioned a delay of two or three hours, was a deviation, the plaintiffs have attempted on a second trial, to prevail upon the same facts, on the ground that the deviation proved was a barratrous act on the part of the master; and so that the assured, not being owners of the vessel, but merely shippers of goods, are, by the express terms of the policy, entitled to recover. The verdict was, however, returned for the defendant, in conformity with the direction of the judge, who charged the jury that the facts proved did not show any willful breach of duty towards the owners, on the part of the master, nor any fraud or criminality in him.

The question submitted to us by the motion for a new trial, which has been fully and ably argued, is, whether the charge to the jury was right in point of law; or rather, whether the facts proved in the case did not require a charge, that an act of

barratry had been committed by the master in the transaction, which has already been declared by the court to be a deviation. The question is of importance, and not altogether free from difficulty; but as we have unanimously come to a result, satisfactory to our own minds, we do not think it proper to keep the parties in suspense upon a question highly interesting to them, for the sake of giving a more perfect statement of the reasons which have brought us to this result, than the present opportunity will enable us to do.

Our opinion is, that the act alleged to be barratry was a simple deviation and not barratry. That every deviation is not barratry was solemnly decided in the last case, in which the subject has been discussed in the court of king's bench in England, the case of *Earle v. Rowcroft*, in which Lord Ellenborough examined all the preceding decisions, and came to the conclusion, which is warranted by a scrutiny of all the authorities, that it is essential to the offense of barratry that the act complained of should be either criminal or fraudulent on the part of the master.

Some of the cases cited by the counsel for the plaintiffs, considered separately, and without relation to other cases settled with at least equal solemnity, certainly give color to the doctrine that every act of the master which is contrary to his duty to his owners, and which may be prejudicial to them, is barratry, although accompanied with no crime or fraud, and even although done with an honest intention to promote their interest. But we apprehend, if these cases are carefully inspected they will be found not to militate with the rule laid down in *Earle v. Rowcroft*.

The strongest cases cited for the plaintiffs is that of *Moss v. Byrom*. There the master had taken a letter of marque for the sole purpose of enticing seamen to ship for his voyage, and without any intention to use it for any other purpose, he not having taken certain documents which were necessary to authorize him to act under his commission. But on his voyage, with the assent of his crew, he stopped and plundered an American vessel, having previously determined to cruise for prizes. Afterwards he cruised for some days out of the course of his voyage, and captured a vessel which he sent into port, whither he followed her and libeled her as prize, as well for the owners as himself. Aware that he had done wrong, he directed that his cruising should not be mentioned in the log-book. In an action against the underwriters for a loss by barratry of the

master, they were held liable; and it was considered that the stopping to plunder the American vessel was in itself barratry, because contrary to his duty to his owners, who were bound by charter-party to proceed with the ship to Liverpool as speedily as possible. It is not stated in the case that the act was held to be either criminal or fraudulent on the part of the master; but the decision seems to be placed upon the ground that he had acted contrary to his duty to his owners, and to their prejudice. The defense made by the underwriters was, that the conduct of the master did not amount to barratry, because it did not appear that he intended to prejudice the interest of his owners. But the court determined that it was immaterial what his intentions were, provided he had violated his duty.

If this case stood alone, it would go far to support the plaintiff's claim in the present action; for, although it is difficult to exculpate the master from fraud or perhaps crime, that is, a breach of law, in cruising without having the documents necessary to authorize him to cruise, yet it does not appear that stress was laid by the court upon that point. But upon comparing this with cases afterwards decided, and especially with that of *Phyn v. The Royal Exchange Assurance Company*, 7 T. R. 505, which appears in the very next volume of Term Reports, the inference can hardly be avoided that the circumstances of the first case were considered to afford an imputation of crime or fraud against the master.

In this latter case, goods were insured from London to Jamaica, and the instructions were to proceed immediately to Jamaica. The ship was carried by current out of her reckoning to a certain point from whence her direct course was to the south-west, instead of which the master bore up to the north-west about thirty miles, where he brought the ship to anchor. There an embargo was laid, and afterwards, news having arrived of war between Spain and Great Britain, the ship and cargo were seized and condemned as prize. In a suit against the underwriters one count was for a loss by barratry. It was held to be deviation and not barratry; and Lord Kenyon held that it could not be barratry, without a fraudulent purpose of the master at the time. The jury found "that the departure was a deviation, owing to ignorance or something else, but that it was not fraudulent;" and they returned a verdict for the defendants. Upon the motion for a new trial, the court were clearly of opinion that there must be fraud to constitute barratry. And the learned Justice Lawrence said he knew of no case in which it is

said that the act of the captain is barratry, merely because it was against the interest of the owners; it must be done with a criminal intent, and that the jury having negatived fraud, had negatived criminality, and so, that it was not a barratrous deviation. Nothing can be more explicit than this doctrine as laid down by this able judge, and if we do not find it overruled by later decisions, it must be taken to be the settled law of England that fraud or criminality is essential to barratry.

If the prior case of *Moss v. Byrom*, had been considered as establishing a principle short of this, certainly some notice would have been taken of that decision. No comment having been made upon it, the inference seems to be irresistible that fraud was considered as the basis of the decision, notwithstanding, by the reported opinion of the court, it would seem that a breach of duty alone was the ground of the determination. And when we find that the facts in that case show that the master acted unlawfully in cruising without authority, and fraudulently in suppressing the evidence of his transactions in the log-book, there ought not to be thought any discrepancy between the two cases.

The cases cited, which were decided before those which have been commented upon, affirm no other principle than that which has been deduced from these two principal cases. That of *Vallejo v. Wheeler*, was a case of illicit trade by the master. The doctrine established by it is well expressed in the marginal note. It is, that barratry is every species of fraud or knavery in the master or mariners of a ship, by which the owners or freighters are injured; and a deviation, if such, that is, if fraudulent or knavish, is barratry.

The other case of *Ross v. Hunter*, is founded upon the fraud of the master, in dropping his anchor at the mouth of the river Mississippi, and going up the river for fraudulent purposes of his own, instead of proceeding immediately to New Orleans, which was the termination of the voyage insured.

No new question seems to have arisen upon the subject in England until the case of *Earle v. Rowcroft*; and the doctrine we have adopted is most fully and explicitly recognized in that case by Lord Ellenborough. The only point which seemed to be unsettled before that case, was, whether an act of the master, although criminal, was barratry, unless he intended by it to injure or defraud his owners. It seems extraordinary that such a doubt should have existed; and yet we find it contended at so late a period, that an illicit trading with the enemy was not

barratry; because the master had in view the benefit of his owners rather than his own. To settle this point only was thought to require an elaborate argument of the Lord Chief Justice; but he is careful to prevent any inference being drawn against the principle, before so well settled, that without fraud or crime there can be no barratry; and he closes his argument with a caution not to infer from it that simple deviation can be turned into barratry, to the prejudice of underwriters; for he says there is no case in which barratry can exist without fraud or crime.

We think after this view of the various decisions in England, there can be no longer a doubt as to the state of the law there on this subject; and there is no reason why the same doctrine should not be admitted here. We have no decisions which militate with it; and there is no reason why barratry, which is in itself criminal and odious, should be imputed to conduct here which would not have that character in England.

There may be violations of duty by a master, which may subject him to actions by his owners, and to suitable damages without charging him with barratry; and it is for barratry only, according to its technical definition and meaning, that underwriters have stipulated to answer. Inferior misconduct is an affair between the owners and the master, for which the underwriters upon a policy do not undertake to indemnify; and there is no reason that they should, since they seldom, if ever, have a voice in the appointment of the master.

Considering it, then, as well settled law, that a fraudulent purpose or criminal act is essential to barratry, we are to inquire whether, from the facts existing in this case, either can be fairly imputed to the master of the *Volant* in her voyage from France to the United States.

It has been before decided in this action that increasing the armament of the ship, and taking a commission as a letter of marque, furnished no cause of complaint to any one. This alone, even if done without the assent of the owners, would not have been barratry. But it appears that for this the master had the advice and approbation of the agents of the owners and shippers, and of the person who acted with him as supercargo. It is found by the verdict that he did not cruise or even chase; the last of which acts would have been justifiable as regarded his owners, if there had been no restriction upon his use of the commission; and even the underwriters could not complain if they also in the policy had assented to his taking the commission. But it was understood that his commis-

sion and his armament were for defense only; and contrary to this understanding, as it is supposed, he captured a vessel which he had been endeavoring to avoid; and in making this capture he put about and was delayed, not by sailing out of his course, but in manning his prize, two or three hours. Was this a fraudulent act? He certainly did not intend to capture the vessel for himself alone; for she was libeled for the owners. And although this alone would not excuse him, yet it may well be considered as evidence of innocent intentions. Was it a gross malversation in him, as in one of the cases cited? It appears that what he did was by advice of the supercargo, who was on board, of one of the shippers of the goods and of all the crew. Ought it not rather to be considered as a mistake of his duty under these circumstances? And may he not have innocently been mistaken when he had a commission, by the consent of all concerned, with no other restriction upon it than an understanding that he was to act only on the defensive? And might not even a discreet man have supposed that to have taken a vessel which was thrown into his power, was no infringement of the understanding that he was to use his commission defensively only?

If these are fair inferences from his conduct, there was no fraud; and the jury must have so found if that question had been precisely put to them. Was the taking of a prize a criminal act? This cannot be pretended, for the vessel captured was in the power and possession of the enemy, and his commission fully authorized him to make prize of her. There being then no fraud and no crime, there can be no barratry.

It is said that he acted contrary to his duty to his owners, because his orders were to proceed immediately home from France. Without considering at this time whether the subsequent proceedings in France ought not to be considered as a qualification of those orders given so long before, it is a sufficient answer to say that this may be, and yet no barratry. In the case of *Phyn v. The Royal Exchange Assurance Company*, the orders were to proceed with all possible expedition; yet there was a delay and a deviation, which was held not to have been barratry. Whether the master acted contrary to his duty to his owners under all the circumstances of the case before us, may be a question; but it is not necessary now to decide it.

It has been urged by the counsel for the plaintiffs, with as much force, as zeal and eloquence, without authority, can give, that the former decision in this case, by which the underwriters

were discharged, because the very act now complained of was a deviation, necessarily draws after it at this time a decision that the same act was barratry; because the shippers and owners lose their insurance by this act of the master.

But this is assuming that there can be no deviation without barratry, which is contradicted by all the authorities. The underwriters stand upon their legal rights under this contract. They avoid liability by showing that the voyage has not been performed according to the implied warranty in the policy. If they ask for law it must be dealt to them. But we are not at liberty because a misfortune has occurred, for which no indemnity can be had in one form to give it another against the principles of law. In order to help the assured we cannot hold that to be barratry to which the law has not given that character.

Judgment on the verdict.

For cases on barratry see *Wilcox v. Union Ins. Co.*, 4 Am. Dec. 480; *Crossillat v. Ball*, 2 Id. 375. The definition of barratry in this case is followed by Woodbury, J., in *Joy v. Allen*, 2 Wood. & M. 320.

WOOD v. NEW ENGLAND MARINE INSURANCE CO.

[14 MASS. 31.]

INSURANCE—WHEN VESSEL DEEMED “AT SEA.”—A vessel was insured for twelve calendar months, with an agreement that if she should be at sea when the year expired, the risk should continue at an agreed premium until she reached her port of discharge; and it was held that being in a foreign port at the expiration of the term, having been captured and carried thither against the will of the master, she was still “at sea” within the meaning of the policy.

IDEM—EXCEPTED RISK.—An exception in a policy of insurance against any loss arising from the violation of existing laws or regulations of belligerent nations, restricting neutral commerce, does not cover a loss occurring from the violation of any decree subsequently made.

ASSUMPT upon a policy of insurance upon the brig Sally-Ann for a total loss. Plea, the general issue. Verdict for the plaintiff, subject to the opinion of the court upon an agreed statement containing the following material facts: The defendants executed the policy declared upon, on December 24, 1806, insuring the vessel for twelve calendar months from the day of her departure from Newburport “to every port or place to which she may proceed, excepting the West Indies.” At the

foot of the policy there was this memorandum in writing: "Should this vessel be at sea at the expiration of the above period, the risk is to be continued until her arrival at a port of discharge. It is understood the company are not liable for any loss or expense arising from the violation of the existing laws or regulations of any of the belligerent powers restricting neutral commerce." Within the year the vessel sailed from Beverly for Amsterdam. On the voyage, she was captured by an English letter of marque, on the pretense that she was bound to an enemy's port, and was carried to Bristol, where she was when the year expired. As soon as possible after her arrival, the master procured her release, and proceeded on his voyage to Amsterdam. Arriving off the Texel, the vessel was captured by a French privateer under the "Milan decree," then lately promulgated by the French emperor, for having come from a British port and having been spoken with by British cruisers, and was afterwards libeled and condemned as a prize. The captain did not know of the existence of the "Milan decree" when he sailed from Bristol. The question was: 1. Whether the vessel was "at sea," within the meaning of the policy when the year expired; and, 2. Whether the loss for the pretended violation of the "Milan decree" was covered by the exception above recited.

Prescott and Hubbard, for the plaintiff, cited *Scott v. Thompson*, 4 Bos. & P. 181; *Robinson v. Marine Ins. Co.*, 2 Johns. 89.

Gorham, for the defendants.

By the Court, PARKER, C. J. Several questions have presented themselves in this case, of somewhat difficult solution, but we are now ready to decide them.

The first respects the duration of the risk; whether it continued to the time when the ship was captured by the French privateer. At that time the year, which was contemplated as the termination of the policy, had expired. But by the terms of the policy, if the ship was at sea when the policy expired, the risk was to continue until the voyage should be completed; and an additional premium by the month was to be paid, until the termination of such voyage. At the expiration of the year, the ship was not literally at sea, but was in a British port, whither she had been carried against the will of the master.

Was she, then, within a fair construction of the contract, within the intent of the parties, at sea? We think she was. She was absent on a voyage which had been commenced within

the time of the original risk. She would have been protected, upon that voyage, to Amsterdam and back again; because within the common meaning of the term "at sea," which was undoubtedly adopted by these parties. A vessel is considered in that condition while on her voyage and pursuing the business of it; although during a part of the time she is necessarily within some port, in the prosecution of her voyage. The intention, in prolonging the risk beyond twelve months, was unquestionably to give the ship protection under the policy, in case that time should expire, while the vessel should be employed in some unfinished voyage; and, whether in a foreign port, or actually upon the high seas, we believe there was no difference in the contemplation of the parties, when the contract was made.

The policy being in operation at the time of the capture, the next question is, whether the loss happened within any peril insured against. And here we must ascertain what was the loss complained of. It is the capture by a French privateer, on the pretext that the ship had come from a British port, and had been spoken with by British cruisers. This is certainly within the general risks provided against in the policy; for it was an arrest and detention and final loss, by the force and violence of subjects of the then emperor of France. We must, therefore, consider the exception in the memorandum at the foot of the policy, and see whether by that the underwriters are discharged.

This exception is from any loss or expense arising from the violation or the existing laws or regulations of any of the belligerent powers restricting neutral commerce. At the time of executing the policy, the Berlin decree of the emperor of France was existing; but no other decree, either of France or Great Britain were in force, which restricted neutral commerce. Had the vessel been captured under that decree, the underwriters would have been discharged. But upon examination of that decree, we do not find any of its provisions, which would have subjected this vessel to capture. It does not appear that she had articles of English growth or manufacture on board, or those of her colonies. By the terms of that decree, vessels coming from a British port were prohibited from entry into a port of France or her dependencies; but they were not thereby made liable to confiscation, unless there had been a false declaration of the master or others on board, to evade this article of the decree.

At the time of the capture, the Milan decree was in force, which subjected the ship to capture, if coming from an English port, or if she had been spoken with by British cruisers. Now, although this vessel would probably have been taken under pretext of the Berlin decree, had the Milan decree not been passed, as the system of plunder was then in full operation, yet as another decree existed, which authorized French cruisers to capture vessels situated like this, we must suppose she was captured under the latter, and not under the former decree: *Causa propinqua, non remota spectatur*. And by the allegations of the libel, it appears that it was under the last-mentioned decree that the ship was claimed by the captors as prize.

This narrows the question to the point whether the term "existing decrees" as used by the defendants in the exception to their liability under the policy, can, by fair construction, comprehend the Milan decree. And we should willingly yield to the construction urged for the defendants, if it were consistent with the most liberal use of terms as they are commonly used by merchants. But it must be considered that the underwriters were, in this respect, making their own bargains, and inserting their own phraseology; the object being to secure themselves, by the exception, against a risk, which, in the body of the policy, they had incurred.

What did they intend to provide against? Surely against any decrees then in force, whether known or unknown. The ingenuity of the belligerent powers, and particularly of the French emperor, in manufacturing decrees against neutral commerce, was not foreseen, or at least, not sufficiently provided against. At any rate, it was thought enough to secure themselves against any decrees already in force. The Berlin decree had passed, and was probably heard of when the policy was effected. It might have been supposed that a retaliatory or countervailing decree would immediately be made by Great Britain. It was thought sufficient to provide against such decrees as were in force on the twenty-fourth day of December, 1806. Had it been designed to secure against all such decrees as should be made during the risk under the policy, surely more apt words would have been taken than those made use of in their memorandum. At any rate, we cannot distort language so as to make the term "existing" mean something which is to be made to exist afterwards.

It is thought hard that the defendants should be made liable for a loss happening from means which neither party calculated

upon when the contract was made. But it does not differ from the case of the breaking out of a war which occasions a capture; when at the making of a policy the most profound peace existed, and there were no symptoms of approaching war. In such a case the underwriter loses, because he did not guard himself in the policy.

With respect to going into England, and thus exposing the ship to the rapacity of the French, under their monstrous decrees, this appears, by the statement, to have been wholly involuntary on the part of the master; and his sailing for Amsterdam was not a violation of duty, because he did not know of the Milan decree; and his permission to sail for Amsterdam from Bristol sufficiently exculpates him, on account of the British orders in council. The British ports could not be considered as under blockade, by virtue of the Berlin decree, when there was notoriously no force there to carry it into execution; and a seizure and condemnation on that ground would have been considered a violence not justified by the law of nations. Indeed, the decree itself did not expose vessels to capture for coming from English ports, but only prevented their being received at French ports. It was, therefore, no breach of duty in the master to leave Bristol, and sail for Amsterdam. Although, by the letter of the Berlin decree, his vessel might have been turned away on that account from Amsterdam, yet she was not made liable thereby to capture; and the master might well have supposed that, as he had been carried into the English port by force and constraint, the decree would not be enforced against him.

It has been said in argument that the ignorance of the existence of the Milan decree on the part of the master does not the less expose the owners to the loss of their insurance, because he sailed from England in violation of the letter of that decree. But we see it nowhere decided that a vessel sailing from a neutral country to a blockaded port, or a neutral vessel sailing from the blockaded port of a belligerent, the owners and masters having no knowledge of the blockade, thereby becomes liable to be made prize. There may be a presumption of knowledge where a blockade actually exists, which will defeat the excuse of ignorance. But in this case there was not, nor could there be any blockade of the English ports; and there was nothing from which the knowledge of the master could be inferred of the exposure of his ship under the Milan decree, except that it had been published in England before he sailed

from thence. But this inference is rebutted by the verdict of the jury.

Upon the whole, we think the loss in this case comes within the policy according to the fair principles of construction, and not within the memorandum, under which the defendants would shelter themselves.

The premium being stated in the policy at one per cent. per month during the continuance of the risk, and it being agreed that the amount of it shall be deducted from the sum adjudged to the plaintiff, it is necessary that we should decide the time for which the plaintiff is held to pay it under the circumstances of the case; and it is our opinion that the same is recoverable from the commencement of the risk until the time when the final compromise took place between the captors and the master.

In *Gookin v. New England, etc. Ins. Co.*, 12 Gray, 510, the decision in this case is limited, where it is said regarding the principal case: "The broad doctrine is stated in the opinion of the court delivered in that case, that a vessel is 'at sea,' within the meaning of that clause in the policy, 'while on her voyage and pursuing the business of it, although during that time she is necessarily in some port, in the prosecution of her voyage.' To that case, as an authority, it is objected, however, that the facts thereof well authorized the plaintiff to maintain his action independently of any such doctrine as was stated in the opinion of the court, and now relied on as an authoritative adjudication of the present question. * * * The only point, therefore, required to be decided in that case, was whether the vessel, not having reached Amsterdam within the year, and having been in a port only as carried there by force by a British private armed vessel, was, within the meaning of the policy, 'at sea' at the expiration of the year. Assuming the putting in and stay at Bristol to be an act for which the assured was not responsible, and not affecting the policy, the case was clearly for the plaintiff as to the duration of the risk, and this without deciding the question now raised." So it was determined that a policy of insurance upon a ship for a year, and "if the ship is at sea at the end of the year, then to continue at *pro rata* premium until she arrives at her port of destination," terminates when the ship at the end of the year is, or afterwards first arrives, at a place to which she is sent to take in cargo, although it is not a port by law, but an open roadstead, with no haven, harbor, or custom-house, and is not her final destination. In *Washington Ins. Co. v. White*, Gray, J. thus refers to the principal case: "In *Wood v. New Eng. Ins. Co.* the point adjudged was, that a vessel, which at the expiration of the year was actually in a port into which she had been carried by overwhelming force while proceeding on her voyage on the high seas, was 'at sea' within the meaning of such a clause. The authority of the decision has been limited to that point, and the more general *dicta* of Chief Justice Parker in delivering the opinion disapproved in the later cases."

GAYETTY v. BETHUNE.

[14 Mass. 49.]

RIGHT BY PRESCRIPTION.—No period short of twenty years is sufficient to raise the presumption of a grant to an easement; and to establish a prescriptive right, there must be an uninterrupted adverse enjoyment under a claim of right.

WAY BY EXPRESS GRANT.—A grant of land, with “all the privileges and appurtenances thereto belonging,” will not give an easement not already existing.

WAY BY NECESSITY.—A way of necessity exists only when there is no other outlet to a public highway.

ACTION on the case for disturbing the plaintiff in the enjoyment of a way. The cause was submitted upon the following agreed facts: In 1723, Catherine Winthrop, being seised in fee of a certain messuage in Boston, bounded easterly on Cornhill Square, measuring forty-six feet, and extending westerly to land belonging to the county, conveyed the same with the appurtenances to Henry Deering, who owned the adjoining tenement. The whole front line of the land so conveyed was then, as now, covered by a brick dwelling-house, through the southerly end of which is a passage four feet wide, with a gate or door at each end leading from said messuage into Cornhill Square. In 1765 Deering conveyed to one Apthorp the premises aforesaid, together with the said adjoining tenement, bounded on Cornhill Square easterly thirty-nine feet, and consisting then and now of a dwelling-house erected on the north line one hundred and fifty feet in depth, with a yard on its south side twenty feet wide, extending from Cornhill Square to the county land. In 1767 both said messuages were conveyed by Apthorp to G. Bethune, father of the defendant, who died seised of the same in 1785, and partition of whose estate was made among his heirs in 1801, by commissioners, pursuant to statute. From the death of Bethune until said partition, Thomas English, as agent for the heirs, leased both tenements from year to year, specially granting to the lessees of the northern tenement permission to carry wood and hay, and to pass with carriages over said southern tenement through a gate in the fence between them, and making a corresponding reservation in the leases of the southern tenement. In the said partition the southern tenement, with all the privileges and appurtenances to the same belonging, was set off to English and wife, who conveyed to the defendant, and the northern tenement was set off to the heirs of Edmund Dunkin, and about six years ago was conveyed to the

plaintiff, no mention being made in the partition of any right of way over the southern tenement, though a similar way was expressly granted to one of the heirs over land in Cambridge assigned to another of them. For more than thirty years prior to 1816, the successive tenants of the tenement, now owned by the plaintiff, have, at their convenience, passed and repassed continually with carriages and carts from Cornhill Square to the said tenement, through the yard of the messuage now owned by the defendant; and there is an ancient gate in the fence between the two estates, the fastenings being on the plaintiff's side of the fence. There was an ancient building on the plaintiff's estate, formerly occupied, but probably not originally constructed, for a barn, which fell down from age and decay about sixteen years before the commencement of the action. Prior to his purchase the plaintiff had a lease of said estate from Edmund Dunkin for three years, in which were the words, "with the privilege of a passage-way through the yard of the house adjoining south of said premises, for wood, hay, and wheel-carriages, to pass to and from said house and yard." The plaintiff bought said estate of the heirs of Edmund Dunkin at auction, and at the sale the auctioneer stated that the estate would be sold with the privilege of a cart or carriage-way through the yard of the southern tenement, but the defendant was not present and knew nothing of the sale. Neither in the deed to the plaintiff nor in any of the ancient deeds was there any mention of the passage-way, but they all contain the usual expression of "all privileges and appurtenances," and in those of Deering to Aphorp and of Aphorp to Bethune there is granted the following privilege: "also the free and uninterrupted liberty, use and privilege of the well and pump standing in the passage-way, that is between the hereby granted premises and the brick church." There is no carriage-way into the yard of the plaintiff but through the defendant's yard. On the ninth of February, 1816, the defendant shut up the way through his yard, and forbade the plaintiff to use it any longer.

W. Sullivan, for the plaintiff, cited *Whalley v. Thompson*, 1 Bos. & P. 371; *Holcroft v. Heel*, 1 Id. 400; Bull. N. P. 74; *Campbell v. Wilson*, 3 East, 294; *Daniel v. North*, 11 Id. 374; *Ballard v. Dyson*, 1 Taunt. 279; 5 Id. 311; Plowd. 170; Cro. Jac. 170, 190; Noy, 84; 6 Mod. 3; 2 Lutw. 1487; 2 Sid. 111; *Houlton v. Frearson*, 8 Term, 50.

Amory, for the defendant.

By Court, PARKER, C. J. The plaintiff in this action demands damages against the defendant for an alleged wrong in interrupting him in the use of a way or passage from land in the rear of a certain tenement, of which he is seised in fee, over land adjoining which belongs to the defendant, into the square sometimes called Church Square and sometimes Cornhill Square, which is in the rear of the block of buildings standing upon upon the former site of the old brick meeting-house.

His counsel would derive his right to the easement claimed, by showing from the facts agreed that he acquired it by prescription, or by so long a use as raises a presumption of a grant, or by operation of law as a way of necessity, and he expects to prevail upon one or other of these grounds.

With respect to a prescriptive right, as those terms are commonly used, that is, an adverse claim and exercise of the right for sixty years, there can be no pretense of succeeding upon this ground. For the plaintiff's title to the estate to which the easement is supposed to be appurtenant, did not commence until about six years before the commencement of the action, and before that period he had held the same estate under a lease from year to year for three years, which was the first connection he ever had with the estate. Nor can he avail himself of any antecedent use of the easement by his grantor sufficient to support a prescriptive title, for he did not become proprietor until the year 1801—less than twenty years ago. Previously to that period, as far back as the year 1723, both the estates were owned by one and the same person; Deering being the proprietor in that year; Apthorp from the year 1765 to the year 1767, and from that time, Bethune, until his death in the year 1785. During all this time, no such right as is contended for could have existed. For it is impossible for a man to have an easement or right of way in his own estate. A passage *de facto* may have been used by the occupants of the northern house over the land belonging to the southern tenement, but this must always necessarily have been by permission of the proprietor of both estates; and no one who afterwards became proprietor of the estate to which the passage is supposed to be appurtenant could set up a right growing out of such permission.

Prescription, in the ancient sense of the word, is founded upon the supposition of a grant, and therefore it is that the use or possession on which it is founded must be adverse, or of a nature to indicate that it is claimed as a right and not the effect of indulgence, or of any compact short of a grant. The death

of George Bethune, the elder, having happened but thirty-two years since, the title by prescription must wholly fail.

Then it is said that the easement was created by grant, and that the assignment by the commissioners under the statute must be considered as a grant to Dunkin and his wife, who was the daughter and one of the heirs of Bethune.

This cannot be inferred from the words of the assignment. The northerly tenement is set off by metes and bounds to Dunkin's wife; and no easement is given; unless by the general terms, "all the privileges and appurtenances thereto belonging." Nor is there any exception or reservation in the assignment of the southerly tenement to English and his wife, another daughter of Bethune, to whom that estate was set off without any incumbrance whatever. Admitting that the words "privileges and appurtenances" are sufficient to pass a right of way in actual existence, which the authorities seem to indicate, yet such words will not create a new easement; and it has been observed that none such existed at the time these estates were divided. Nor is it necessary to give these words so extensive a meaning, in order that they may have some operation; for the privilege of using a pump or well was appertaining to both these estates when created, and it was proper, if not necessary, for the commissioners by some general words, to secure the continued use of it to each, after the division should take place.

If the words had been, "with all ways therewith used," or heretofore used," the evidence of the actual use of this way before or at the time of making the partition, would have been material and perhaps decisive, to show that the way now contended for ought to pass appurtenant to Dunkin's estate.

The fact that English, when agent of both estates, in leasing the northern house, gave this right, and reserved it in the lease for the southern house, proves only that he chose to accommodate his tenants, but created no right adverse to the owners of the southern house; and the fact that Dunkin made the same provision, has no greater bearing upon the question. But the necessity of providing for it by lease, and the omission of granting it by the deed, when Dunkin conveyed to the plaintiff, is very strong proof that the easement was not supposed to exist by law in the proprietor or tenant of the northern house.

But it has been argued that the possession and use of this privilege has been such as to furnish presumption of a grant. If this were so, that presumption must be judged of by the jury and not by the court. We apprehend, however, if the cause

were before a jury, there is not evidence in the case from which a grant could be presumed. No time, before the division of the estate among the heirs, could be taken into view for the purpose; because, as has been before observed, there could not have been before that time any adverse possession, the whole being in Bethune, or his grantors. And it is adverse possession only upon which a presumption of a grant can arise, or a possession claimed or used as a rightful possession. Since that period sufficient time has not elapsed to justify the presumption of a grant can arise, or a possession claimed or used as a rightful possession. Since that period sufficient time has not elapsed to justify the presumption of a grant from English and his wife. No period short of twenty years has been allowed sufficient for this purpose in this country; nor has it been definitely settled that any shorter period will suffice in England. Perhaps, by analogy to the time when the right of entry is taken away from one having a right of possession, the term of twenty years has been established as the proper period to found a presumption of this kind upon. There seems, at least, to be no good reason for diminishing the time; and to admit it in all cases, when only a few years' use of another's land has been enjoyed, would be likely to defeat the provisions of the statute, which requires that all rights and interests in lands and tenements shall pass only by deed or writing: Stats. 1783, c. 37.

The third point insisted on for the plaintiff is, that a way exists of necessity over the ground of the defendant, from the rear of the premises belonging to the plaintiff. But this is by no means tenable. This right depending upon necessity, exists only where the person claiming it has no other means of passing from his estate into the public street or road. In the case before us, there is an avenue, and one which was provided when the house was built, leading from the street to the land in the rear of the house; besides which, the house abuts on the street or square, so that the plaintiff may open a passage if he has not one already. A right like this is to be construed strictly. In the case of *Pernam v. Wead*, 2 Mass. 203 [3 Am. Dec. 43], the plaintiff had no other way to get from his land to the public street, and the front land had been taken from him *invito* by his creditor. In other cases, when a man has granted land surrounded by land of his own, which he retains, he is supposed tacitly to have granted a right of way, upon the well known principle, that when a man grants anything, he is held to have granted everything necessary to the use and enjoyment of the

thing granted. It may well be doubted, whether, if a man voluntarily take a conveyance of land, which is surrounded on all sides by land of his grantor and others, he can enforce this right of way, under a plea of necessity, against any one but him who conveyed to him. Now, in the case at bar, the plaintiff must be held to have voluntarily purchased, knowing the situation of the estate, and if he had no access to the back part of it, but over the land of another it was his own folly, and he should not burden another with a way over his land for his convenience.

The idea of necessity in this case seems to be referred altogether to the ancient barn, which formerly stood upon the land, now owned by the plaintiff in the rear of the house. But that barn has not been standing for sixteen years, and there is no reason to suppose that it had been used as such within the last thirty years. Now, if it could be maintained, that a barn was necessary within a town or city, still the plaintiff cannot be supposed to have purchased with a view to the enjoyment of one which had disappeared long before he purchased, and he cannot now found a claim upon a necessity, which arises from the desire to erect a new barn upon the same site.

We think the plaintiff not entitled to recover upon either of the grounds upon which his counsel has endeavored to support his action. According to his agreement, therefore, he must be called.

Plaintiff nonsuited.

The period required to establish an easement by prescription has varied very much, until at present it is reduced to twenty years. At first all prescriptive rights were required to be enjoyed for a period "whereof the memory of man runneth not to the contrary" in analogy to the time necessary to establish a right to the land. This indefinite period of legal memory by the statute of Westminster, i., c. 39, passed in 3 Edw. I., was taken from the time of Richard I., a period of about eighty-six years, and this limitation of the writ to recover the freehold was applied by the courts to the time of prescription, as being within the equity of the statute: 2 Inst. 238, 239; 2 Rol. Ab. 269. In the course of time this period became longer, until it was reduced by St. 32 Hen. VIII., c. 2, to sixty years. Next it was reduced by St. Jac. I., c. 16, to twenty years, and this period has since generally been fixed upon as the time necessary to presume a grant to an easement. In 1786, a statute was passed in Massachusetts, by the first session of which writs of rights were limited to sixty years; and this was the period, it was supposed, a prescriptive right should be enjoyed to presume a grant of such right. This seems to be the period claimed for the establishment of such a right in the opinion; but at present in Massachusetts, as elsewhere generally, twenty years is the term required to establish a right of this kind. See a very able opinion of Gray, J., tracing historically the changes in the law,

AM. DEC. VOL. VII.—13

in *Edson v. Munsell*, 10 Allen, 557; and see *Ashley v. Ashley*, 4 Gray, 200; *Lawrence v. Fairhaven*, 5 Id. 114; *Sibley v. Ellis*, 11 Id. 417; *Leonard v. Leonard*, 7 Allen, 277.

In *Oliver v. Pitman*, 98 Mass. 50, the principal case is referred to on the point of a way existing by necessity.

WYMAN v. HALLOWELL BANK.

[14 Mass. 57.]

POWER OF OFFICERS TO BIND CORPORATION.—A banking company organized under the same name as that of a former one, appointed the same president and cashier, and received and issued the notes of the former company, the officers frequently declaring that there was no difference between these notes and those of the new company. It was held that the new company did not thereby become liable for the notes of the former company.

ASSUMPSIT upon sundry promissory notes or bank bills alleged to have been made in the name of the corporation defendant, and signed by its president, whereby on January 1, 1814, the said corporation promised to pay to "sundry persons, or bearer, sundry sums of money," etc., it being further alleged in the declaration that the corporation by its officers and agents did issue and put the said bills in circulation, and that the same afterwards lawfully came to the hands of the plaintiff, who demanded payment, and that payment was refused, etc. Plea, the general issue. At the trial, the plaintiff offered in evidence certain notes of the "Hallowell and Augusta Bank," bearing date prior to June, 1812, and signed by Benj. J. Porter as president, and Jeremiah Drum as cashier, and of the demand and refusal of payment of the same. It appearing that the corporation sued was not in existence at the date of said notes, and that they were not in fact issued by said corporation, but by another corporation incorporated in March, 1804, having the same name and the same persons as president and cashier, the judge rejected the notes. The plaintiff then submitted evidence tending to prove that the new corporation had received and passed, or issued, bills of the old corporation, paying them out on checks and loans, and that the cashier and some of the directors had frequently declared that there was no distinction between those bills and the notes in fact issued by the new bank; and that upon the faith of these transactions and declarations, the notes of the old bank, including probably some of those sued upon, were received as good. There being no proof that the notes sued or any of them were thus issued by the new

bank as its own, with intent to have them considered as evidence of promises on its part, the judge directed a nonsuit, which it was agreed should be set aside if the whole court should be of opinion that, upon these facts, *assumpsit* in any form could be maintained on said notes.

Prescott and Bigelow, for the plaintiff.

Sullivan and Gorham, for the defendants.

By Court, PARKER, C. J. This case is to be considered without reference to any particular form of action, so that if a declaration in *assumpsit* could be formed which could be supported by the evidence offered by the plaintiff at the trial, giving it its utmost weight, and without regard to any evidence of a contrary tendency which the defendants might be in possession of, a new trial is to be had, with leave to form a declaration accordingly.

We have considered the case in this liberal and extensive view, and are satisfied that no action can be maintained against the present defendants upon the notes which were offered at the trial, without proof that they were issued by the new corporation, as their own notes, and with a view to adopt them as such instead of issuing notes of their own. Indeed, we are not clear that with such proof the defendants would be answerable, unless it were likewise proved that the company, by some vote or other legal act, had authorized the directors or officers of the corporation to bind them in this unusual way. Such a state of facts, without the last mentioned evidence, would prove that the officers, who had so undertaken to pledge the credit of the bank, had acted unwarrantably, and wholly beyond the authority resulting from their trusts and offices; and in so doing they could not implicate the stockholders or company, who are supposed to rely upon the faithful and correct discharge of duty by their agents and servants.

The numerous stockholders in a bank, scattered as they often are over all parts of the commonwealth, would be in an extremely unsafe situation if their property was bound by the irregular transactions, or by the declarations or confessions of their officers, beyond the legal sphere of their action. It is true that it is not required that corporations should act altogether by seal; but their powers and their liabilities are still limited by the usual principles of such institutions, and their officers are restricted to such modes of binding the company as result from the nature of their duty and the powers vested in them by their offices.

The two banks, which have the same name, are necessarily two distinct corporate persons, both having legal existence together, but neither being answerable for the notes, promises or obligations of the other. They unfortunately had the same persons for president and cashier, a circumstance which has caused much confusion and no little mischief. The one last incorporated could, however, be under no obligation to pay the debts of the other, unless by some corporate act they had adopted such debts. The confessions of their officers, or any conversation of theirs tending to create the belief that the bills of the old bank would be paid by the new, could not be admitted as evidence against the corporation.

There may have been great fraud practiced by the persons who had the management of the affairs of these banks, mixed up, as they were, with the same officers and a confusion of property. But fraud cannot be imputed to the company. It is individuals alone, who by their conduct have led people into a belief that the new bank was responsible for the notes of the old; and it is these individuals who are liable civilly to the party injured by their conduct; or criminally, if with a fraudulent view, and with purposes of speculation for their own profit, they have done anything which amounts to a cheat upon the public.

The ground upon which the counsel for the plaintiff suppose that the action can be maintained, is by showing that the notes which are sued in this action, were in fact issued by the new bank as their own notes, and with a view to have them considered as evidence of their own promises. If this were made out by suitable evidence, the case might require more consideration; but even then, the question would arise, whether the officers of the bank could thus bind the company, unless some authority, express or implied, was proved to have been given to the directors or officers, who adopted so unusual a mode of transacting business.

But if such facts were proved, they must be made to apply to the notes upon which the company should be sued; for it would be inadmissible that the new bank should be responsible for all the notes of the old company, because they had adopted and passed some of them as their own. Yet this is the legal inference, acknowledged to result from a decision in favor of this action, upon the evidence which is offered; nothing further being expected to be proved than a presumption that these notes were issued because others had been. And thus the new bank

would be made responsible for the whole amount of the outstanding debts of the old, whether in the hands of the original receivers, or of speculators who may have purchased them for a trifle in the discredited state in which they have been for a long time placed. This would certainly be unjust, and would be carrying the principle of liability for the conduct of agents to an extent never before thought of.

It has been urged in argument that the principles which are applied to contracts made by agents for another, upon an authority implied from former employment of the same agent for similar purposes, would be justly applicable to the defendants in the case before us. But there is a material difference. The individual stockholder commits no authority to its officers but that which is given by the charter of incorporation, and by a vote of a major part in interest of the individuals acting in a corporate form. No sanction of any act, beyond the authority so derived, can be implied by the repetition of such act. For the company as such, or the individuals composing it, might not, and generally would not, know of any transactions of this singular nature. They may reasonably trust that the duty of each will be faithfully performed.

But the principle contended for, will carry the doctrine even beyond that which has been applied, in some instances, to the cases of masters and servants, or principals and agents, in mercantile concerns. The whole of that doctrine is, that when the principal appears to have given unlimited authority to an agent to contract for him, by signing his name to bills of exchange, promissory notes or other commercial paper, he shall not be permitted to deny such authority in any particular contract which appears to have been taken on the faith of authority so given; but the authority shall be implied. In such cases, however, the identical contract which is attempted to be enforced against the principal, must be proved to have been made by the agent for the principal. But in the case at bar, the utmost that the evidence offered could prove is, that other notes had been taken and issued by the bank which is sued in this action; and whether the notes now sued ever were so issued, would still rest in conjecture, or at most but slight presumption; unless it could be proved that all the notes of the old bank had passed through the new in this manner, which has not been supposed in the argument.

Upon the whole, nothing appears in this case but that these banks were unfortunately and imprudently managed, originally,

it may be presumed, without any view to mischief, and that the new bank received in payment, and paid away the notes of the old in the same manner this and other banks did, with all bank notes which were called current; with this only difference that the officers in the new bank, either from too great confidence in the old, or for sinister purposes of their own, upheld the credit of the notes by endeavoring to connect them with the new institution; a conduct for which they may be personally liable, but which ought not and cannot prejudice the company whose interests and character they abused.

Motion to set aside the nonsuit overruled.

The principle on which this decision rests is well stated in *Salem Bank v. Gloucester Bank*, 17 Mass. 29, where it is said: "The case of *Wayman v. Hallowell Bank* recognizes a distinction between acts of an agent for his principal in common cases, and similar acts done by the servants or officers of a corporation. And there is reason for this distinction; for in the first case, the extent of the authority is known only between the principal and the agent; whereas, in the latter, the authority is created by statute, or is matter of record in the books of the corporation to which all may have access who have occasion to deal with the officers."

STANTON v. BLOSSOM.

[14 MASS. 118.]

NOTICE OF NON-ACCEPTANCE.—The drawer of a bill of exchange who has, at the time, effects in the hands of the drawee is entitled to notice of non-acceptance, although such effects be attached before presentment.

REASONABLE TIME.—Such notice is sufficient if given within a reasonable time, although it be after the commencement of the action against the drawer.

NOTICE BY THE DRAWER INSUFFICIENT.—In an action by the holder against the drawer of a bill for non-acceptance by the drawee, notice by the drawee is insufficient, unless authorized by the holder.

ASSUMPSIT by the indorsees against the drawers of a bill of exchange for non-acceptance by the drawees. Plea, the general issue. At the trial it appeared that the defendants, merchants at New York, drew their bill of exchange dated May 13, 1810, payable at thirty days' sight, upon certain merchants in Boston, who had effects of the drawers in their hands, in favor of one Comstock, who indorsed the same to the plaintiffs. The bill was presented May 16, on its arrival by the New York mail, and acceptance refused by the drawees, the effects of the drawers in their hands having been that morning attached by

creditors. The plaintiffs commenced their action against the drawees within an hour after presentment of the bill. The drawees wrote to the drawers by the mail of that day, informing them of their refusal to accept, and of the reasons therefor. Proof of the notice so given was objected to by the defendants, it appearing that it was not authorized by the plaintiffs, and that no other notice had been given by them, or by any one for them. The objection was overruled, and a verdict directed to be returned for the plaintiff, which was to be set aside if the whole court should be of the opinion that the objection was well founded.

Gallison, for the defendants, cited 1 Chitty, 180; Bull. N. P. 277; Kyd, 126; Bayley, 71; 7 Ves. jun. 597; *Tindall v. Brown*, 1 T. R. 170; *Bickendike v. Bollman*, Id. 408; Doug. 683; 2 W. Bl. 747; *Blakely v. Grant*, 6 Mass. 388; Lawes' Pleadings in Assumpsit, 282; *Staples v. Okines*, 1 Esp. 832; *Dennis v. Morris*, 8 Id. 158; *Walwyn v. St. Quentin*, 1 Bos. & P. 655; *Whitfield v. Savage*, 2 Id. 279; *Clegg v. Cotton*, 3 Id. 239; *Orr v. Maginnis*, 7 East, 359; 15 Id. 220; *Rucker v. Hiller*, 16 Id. 43.

Savage, for the plaintiffs, cited *Wilson v. Swabey*, 1 Stark. N. P. 84.

By Court, PUTNAM, J. The first question which presents itself in this case is, whether the plaintiffs were bound to give notice to the drawers of the non-acceptance of this bill by the drawees.

It is settled that where the drawee has no effects of the drawer, no notice of non-acceptance is necessary; and this for the reason, that the drawer had no right to draw upon one who owed him nothing. But in the case at bar, the defendants had effects in the hands of the drawees when they made their bill, and they had a reasonable expectation that it would be paid. We are satisfied that this is a case where the drawers were entitled to notice, notwithstanding the effects were attached after the bill was drawn, and before it was presented for acceptance. It seems, therefore, necessary to consider whether the notice, which was given by the drawees in this case to the defendants, was within a reasonable time; and, if so, whether it can avail in this action, as if it had been given by the plaintiffs.

The plaintiffs commenced their suit before the letter was put into the post-office containing information of the dishonor of the bill. But the letter was in season to go by the first mail. Now, all that is required of the holder, in case of the dishonor of a bill, is to use due diligence to give notice to all who may be

affected, and to whom he intends to resort. No notice may be, in fact, received for months. The party to be notified may be in a foreign country; no opportunity of writing may occur soon, and, after all reasonable care and endeavors, the notice may never arrive in season to be of any advantage; the ship or the mail which carries the letter may be destroyed; but the party who has used due diligence is not to suffer by such events; he is not bound to wait until notice has been received before he is permitted by law to take measures for his security. In the case at bar, therefore, the notice seems to have been given in a reasonable time.

But the point of the most difficulty remains; shall the information communicated by the drawees avail in this action, as if it had been given by the plaintiffs themselves? It has been argued that the defendants have not been prejudiced at all; that their funds, although not appropriated according to their desire, have yet been applied to the payment of their debts; that the information, coming from the drawees, must have been as useful and authentic as could have been given. It is said, also, that the drawees are a party to the bill, and that notice from a party to a bill inures to the benefit of all. In support of this point, the case of *Wilson v. Swabey* was cited and relied on. That was *assumpsit* by the indorsee against the drawer. The bill became due on Thursday, Lewis, an indorser, was notified on Friday, and he notified the defendant on Saturday. The objection was, that there was no notice from the plaintiff; but Lord Ellenborough held that notice from any person who was a party to the bill was sufficient.

But the drawee who refuses to accept is not a party, or chargeable in virtue of a bill, and notice from him is in no degree better than from any other stranger.

More than twenty years ago, it was decided in the case of *Tyndall v. Brown*, which was cited in the argument for the plaintiffs, that notice must come from the holders, and many later decisions have corroborated the rule. In a late case in Campbell's Reports, *Stewart v. Kennet*, 2 Campb. 177, this point is directly decided. The holder himself, or some one authorized, must give the notice. Now the indorser who has been notified by the holder of the dishonor of the bill, may, by reason of his liability, be considered as authorized to notify the drawer, for the benefit of the holder as well as himself, both having an interest in the matter. They can and ought to inform the drawer whether he must pay the bill, and that is a material fact

to be communicated to him and which no stranger is presumed to know. The bill may not be duly honored, and the holder may be willing to accept an equivalent or may give credit to the drawer. In such case the drawer would be discharged. There is good sense in the rule which requires the notice to come from a party liable to be charged upon the bill or having an interest in it, and the drawer is not to be affected by information from any other quarter.

New trial ordered.

Says Dewey, J., in *Cabot Bank v. Warner*, 10 Allen, 522: "There has been some discrepancy in the rules stated, upon the question as to who may give notice to the indorser. But the better rule seems to be that notice may be by a holder of the note or bill, or his agent, or any person who is a party to it and who would, on the same being returned to him and after paying it, have a right of action upon it for reimbursement: *Chanoine v. Fowler*, 3 Wend. 173; *Stanton v. Blossom*, 14 Mass. 116; Story on Notes, sec. 303; 1 Parsons on Notes, 506:" See 2 Daniel on Neg. Instrs. sec. 967.

FARMINGTON ACADEMY v. ALLEN.

[14 Mass. 172.]

VOLUNTARY SUBSCRIPTION.—No action can be maintained upon a promise contained in a subscription paper, to pay money to "such persons as may be appointed trustees," for the erection of an academy, such promise being without consideration.

SAME—ACTION FOR MONEY EXPENDED.—But if upon the faith of such subscription, trustees are afterwards appointed and expense incurred, of which the subscriber has knowledge, and to which he assents by paying part of the amount subscribed, the law will imply a promise to pay the remainder, and an action will lie therefor.

ASSUMPSIT upon a subscription paper signed by the defendant and others, whereby the subscribers engaged to pay the sums severally subscribed to "such persons as shall or may be by the legislature appointed trustees," for the erection of an academy "at or near the center of the town of Farmington." The declaration also contained a count for money laid out and expended, and an additional count for money had and received. The action was submitted upon the following facts: The defendant subscribed fifty dollars upon the paper declared on. An act was afterwards passed establishing the academy and incorporating the trustees, who appointed a committee to erect a building for their use. The defendant, being applied to for payment of part of his subscription, told the committee that he had no money,

but delivered to them, in part payment, a quantity of shingles to be used, and which were in fact used, upon said building.

F. Allen, for the defendant, cited *Thrupp v. Fielder*, 2 Esp. 628; *Andover Turnpike Corp. v. Gould*, 6 Mass. 43 [4 Am. Dec. 80]; *Stiles v. The Attorney-general*, 2 Atk. 152; *Phillips Academy v. Davis*, 5 Mass. 113 [6 Am. Dec. 162].

Culler, for the defendants, cited *Homes v. Dana*, 12 Mass. 192 [ante, 55]; and *Worcester Turnpike Corp. v. Willard*, 5 Mass. 80 [4 Am. Dec. 89].

By Court, PARKER, C. J. According to the decision of the case of *Phillips Academy v. Davis*, cited in the present argument, this action cannot be supported upon the original promise, of which the subscription paper is the evidence; for it appears, by that decision, that a promise of this sort, made to no particular person, and having only a public benefit for its consideration, is no more binding in law than it is upon the consciences of men who are base enough to refuse to perform them. That case was well decided; and we conform to it now, as far as a strict analogy holds between that case and this; so that upon the counts which are supported only by the subscription paper, the plaintiffs in this case cannot recover.

But having lately decided, in an action brought by the present plaintiffs versus Flint, that a recovery might be had on a count for money paid, laid out, and expended, the same principles will apply to this case, unless there be a material difference in the facts. That case not having been reported, it is proper now to state briefly the reasons on which the decision rests, that other subscribers to this institution may see how far they can be justified in resisting payment.

In the case alluded to, the trustees, after being incorporated, and becoming seised in trust of the land which the legislature had granted on the faith of the private funds raised by subscription, proceeded to erect a building for the use of the institution. Flint, being one of the trustees, never having dissented from any of their acts, and having, when called upon for payment, sent a man, who was a debtor of his, to work out a part of his subscription, it was thought that the recognition of his promise, accompanied by a knowledge on his part that the expense was going on, authorized a recovery against him to the amount of his subscription, on the ground of money paid, laid out, and expended to his use and at his request. It was also thought to be like the case of a man working upon the

house of another, who had knowledge of his proceedings, in which case, although he could prove no express request or promise, he would undoubtedly recover for his labor.

The present case differs from the case of Flint only in the circumstance that the defendant was not a trustee. But he was an inhabitant of the town, and must have known of the erection of the building; and he actually advanced some part of the materials, excusing himself from paying the whole subscription only on the ground of his inability at the time. This was sufficient to justify the trustees in proceeding to incur expense on the faith of the defendant's subscription, and having so done, they have expended money for him on his implied request; and so the case is brought within the principles of the decision of *Homes v. Dana*, referred to at the bar.

The case of an infant which has been put, whose promise cannot be made valid by implication, but only by an express new promise after he becomes of age, we do not think in any degree analogous.

Defendant defaulted.

In *Bridgewater Academy v. Gilbert*, 2 Pick. 580, the ground on which the defendant was held liable was stated to be the fact that he subscribed a part of the amount, and did not intimate that he should pay the residue; and it is noticed as being decided on the same ground in *Amherst Academy v. Cowles*, 6 Pick. 437. In *Mirick v. French*, 2 Gray, 423, Merrick, J., thus notices the principle controlling such cases. He says: "It is a well settled principle of law in this commonwealth that when one subscribes with others a sum of money to carry on some common project lawful in itself, and supposed to be beneficial to the projectors, and money is advanced upon the faith of such subscription, with his knowledge and without objection from him, an action for money paid, laid out and expended, may be maintained to recover the amount of the subscription, or such part of it as is equal to his proportion of the expense incurred. It was so determined in this court many years since, and the principle has not been disturbed or brought into question by any subsequent decision: *Farmington Academy v. Allen*, 14 Mass. 172; *Bryant v. Goodnow*, 5 Pick. 228."

HANOVER v. TURNER.

[14 Mass. 227.]

LIABILITY FOR WIFE'S NECESSARIES.—The overseers of the poor of a town may maintain an action against a husband for necessities furnished to his wife, though they may also have a remedy against the town wherein he is legally settled.

DIVORCE IN ANOTHER STATE—DOMICILE.—Where a husband and wife are citizens and residents of one state, and the husband removes into another temporarily, for the purpose of procuring a divorce, such divorce is void in the state in which the parties have their domicile.

ASSUMPSIT for necessities furnished to the wife of the defendant. Plea, the general issue. At the trial the plaintiffs proved the defendant's marriage with his wife, Rebecca; that they lived together in the town of Hanover until 1805, when the wife left the defendant on account of his harsh and cruel treatment, and has since lived separate from him; and that the supplies mentioned were furnished by the overseers of the poor of the town at the request of the wife and upon her representation of her husband's ability to pay for the same. The defendant proved that prior to the time of furnishing said supplies he had gained a legal settlement in the town of Townsend; that immediately after furnishing the supplies the overseers of the poor of Hanover notified the overseers of Townsend of the fact, and called upon them to refund the amount on the ground of the wife's settlement being in the latter town; that in January, 1808, he, the defendant, removed to the state of Vermont, where he remained until February, 1809, with the exception of two short visits to said Townsend, and that in January of that year he procured in the supreme court of judicature in Rutland county, Vermont, a decree of divorce from the bonds of matrimony between himself and his said wife. The judge instructed the jury in substance: 1. That the husband's liability to the plaintiffs for said supplies, if he was liable at all, was not barred by the fact that the plaintiffs might also have an action against the town of Townsend for the same; and, 2. That if the jury believed that the defendant's removal to Vermont was temporary and made solely for the purpose of obtaining a divorce, his said wife never having been within the jurisdiction of the supreme court of Vermont, the said divorce was fraudulent and of no validity. Verdict for the plaintiffs. The question was as to the correctness of their instructions.

Thomas, for the defendant.

Winslow, for the plaintiffs.

By Court, **PUTNAM, J.** In this case the defendant contends that he is not liable: 1. Because he has been divorced a *vinculo matrimonii*, before the supplies were made to the said Rebecca; and, 2. If the divorce was of no validity, the plaintiffs have their remedy against the town of Townsend, where the defendant is settled, and not immediately against him. By the statute of 1793, c. 59, sec. 9, overseers of the poor are required to provide for the immediate comfort and relief of all persons residing or found in their town not belonging thereto, but hav-

ing lawful settlements in other towns, when they fall into distress and stand in need of immediate relief, and the towns where such persons have their settlement are subjected to the payment of such expenses. The plaintiffs found the said Rebecca in want of the necessities of life, and supplied her, and we have no doubt but they might have recovered payment from the town to which she belongs.

But we are satisfied that the remedy is cumulative, and that the plaintiffs may also have their remedy against the defendant. It does not appear but that the defendant may defend this action, as well as if it were brought against him by the town where he belongs, and we perceive no benefit, but much inconvenience, which would arise from the proposed circuitry of action. The principal question is whether the defendant is exonerated, in consequence of the divorce which he has obtained in Vermont.

By the laws of Massachusetts, divorces from the bonds of matrimony are not to be allowed, as in Vermont, for extreme cruelty, and it has not been suggested, that the defendant had, by our statute, any cause for a divorce against his wife. From what appears she might have been entitled to a divorce, *a mensa et thoro*, for his extreme cruelty. Aware of this, the defendant went to Vermont, as the jury find, for the purpose of obtaining a divorce there. It appears that he sometimes returned to take care of his affairs here, while the proceedings there were transacting, and, as soon as the object was obtained, he returned to his estate in Massachusetts. And it does not appear that his wife was ever within the limits of Vermont. She can be considered a subject of that state merely constructively, in consequence of the residence of her husband.

We are satisfied that his residence in Vermont was temporary, and that his domicile continued here. If he had been absent for years in a foreign country, or in other states of this Union for lawful purposes of business, *animo revertendi*, no question would arise of change of domicile; *a fortiori*, when his temporary absence was for the purpose of evading the laws of this commonwealth, to which he owed allegiance.

It is a general rule, that the laws of a state apply to all who are within its limits, and those who have a temporary residence are considered as subjected to the laws of the state while their residence continues: *Huberus de Conflictu Legum*, lib. 1, tit. 3. sec. 2. This applies, however, to laws made for the preservation of the peace of the state, and does not extend to rights and duties arising from the laws of the state where such persons

have their domicile. These remain obligatory upon the subject, notwithstanding a temporary absence. If we were to give effect to this decree, we should permit another state to govern our citizens, in direct contravention of our own statutes, and this can be required by no rule of comity: *Huberus, ubi supra*, 8 axiom.

We are, therefore, of opinion that the divorce thus obtained by the defendant is of no validity here, and does not exonerate him from his liability to support his wife. Judgment is to be entered according to the verdict.

DIVORCES IN ANOTHER STATE.—The doctrine laid down in this case as to the invalidity of a divorce obtained in another state where the plaintiff had no *bona fide* domicile at the time, is now the settled and approved doctrine in this country, and on this point the authority of the case is followed generally. In *Burlein v. Shannon*, 115 Mass. 447, its authority is relied on, and its doctrine is fully affirmed and followed in a late case in Massachusetts: *Sewall v. Sewall*, 122 Mass. 156. This is an instructive case and deserves consideration. Here it is held that when a husband goes into another state without acquiring a domicile there, for the purpose of obtaining, and does fraudulently obtain, a divorce for a cause which occurred in, but which was not a cause of divorce by the law of his own state, a court of the former has no jurisdiction, and its decree granting a divorce is entitled to no faith and credit in the latter state as a judicial proceeding, even if the decree recites facts sufficient to give it jurisdiction. Passing on the question Gray, C. J. says: "When a person domiciled in this state goes, in evasion and fraud of the law of his domicile, into another state, in order to obtain a divorce there for a cause which had occurred here while the parties resided here, or for a cause which would not authorize a divorce by our law, it is within the power of the state, by its courts or its legislature, to declare or enact that a divorce so obtained, before acquiring a domicile in the other state, is or shall be of no force or effect in this state. This application of the general principle has been long recognized by this court, and has been repeatedly affirmed by statute: *Hanover v. Turner*, 14 Mass. 227; Rev. Stat. c. 76, s. 39; *Clark v. Clark*, 8 Cush. 385, 387; *Lyon v. Lyon*, 2 Gray, 387; *Chase v. Chase*, 6 Id. 157; *Smith v. Smith*, 13 Id. 209; Gen. Stat. c. 107, s. 54; *Ditson v. Ditson*, 4 R. I. 87, 93." And this is the doctrine held in a late case in Vermont, *Prosser v. Warner*, 47 Vt. 667, where there is an instructive opinion by Ross, J., in the course of which he says: "The regulation of the marriage relation, and the acts or neglects that may amount to a good cause for sundering that relation, is a matter of internal police, important to and affecting not only the parties to that relation, but the well-being of the state. It would seem it should be administered wholly by the courts of the state where the declared violations of the marriage relation occur, or where the parties are domiciled at the time. The acts relied upon for the cause of divorce must have accrued while the parties were subject to the law of the forum where the divorce is granted. Otherwise the courts in one jurisdiction might determine and administer the marriage relation between citizens domiciled in another jurisdiction. This would allow one jurisdiction to pass laws, in the language of Lord Ellenborough in *Buchanan v. Rucker*, 9 East, 192, 'to bind the rights of the whole world'—a proposition too absurd to require refutation. In much the larger

number of adjudged cases, and as we think of the better considered cases, it has been held that the judgment rendered in a suit for divorce, in a state where the cause of action did not accrue, and where the parties were not then living as husband and wife, and where the defendant in the proceeding never was served with process, nor voluntarily submitted to the jurisdiction of the court, is wholly void in any other jurisdiction than the one in which it was rendered: *Barber v. Root*, 10 Mass. 280; *Hanover v. Turner*, 14 Id. 227; *Lyon v. Lyon*, 2 Gray, 369; *Dorsey v. Dorsey*, 7 Watta, 349; *Maguire v. Maguire*, 7 Dana, 181; *Hull v. Hull*, 2 Strobb. Eq. 174; *Edwards v. Green*, 9 La. 317; *Irby v. Wilson*, 1 Dev. & Batt. Eq. 558, 576; *Borden v. Fitch*, 15 Johns. 121; *Bradshaw v. Hatch*, 13 Wend. 407; *Vischer v. Vischer*, 12 Barb. 640. The courts of New York have gone quite as far as those of any state in holding such judgments void. In the case of *Borden v. Fitch*, it was held that such a judgment rendered by the supreme court of this state was wholly void, and was not admissible in evidence for the defendant in a suit to recover damages from him for debauching the plaintiff's daughter, to whom he had been legally married, if the judgment rendered by the supreme court of this state, divorcing him from a former wife, who was residing in Connecticut, and who was not served with process in this state, and did not appear in the suit, and whom he left in Connecticut when he came to this state to reside, was valid. The contrary doctrine has been maintained in *Harding v. Allen*, 9 Greenlf. 140; *Ditson v. Ditson*, 4 R. I. 89; and *Tolen v. Tolen*, 2 Blackf. 407. In *Ditson v. Ditson*, the validity of *ex parte* divorces in foreign states is attempted to be upheld on the principle that jurisdiction of the cause is acquired by the domicile of one of the parties, notwithstanding the cause accrued without the state, upon the ground that it pertains to all sovereign states to declare conclusively the *status* of their own citizens. But the soundness of these decisions is strongly questioned, both upon principle and authority, by the late Chief Justice Redfield, in an article in 3 Am. Law Register, N. S. 193, in which he thoroughly reviews the whole subject. He admits that such judgments may be a protection to the parties obtaining them, in the jurisdictions where they are obtained, but denies that they have any validity in foreign jurisdictions. Such, we think, is the better doctrine. Otherwise, in determining the *status* of its own citizens, such sovereign state, necessarily, conclusively determines the *status* of the citizens of another sovereign state, whenever the other party to the marriage relation is domiciled in a foreign jurisdiction. Such doctrine involves an unavoidable conflict in the jurisdiction over its own citizens, as such sovereign state must concede to other sovereign states the same right in regard to its own citizens which it claims to exercise over the citizens of such other sovereign states."

In harmony with these views, see *Hoffman v. Hoffman*, 46 N. Y. 30; *Kerr v. Kerr*, 41 Id. 272; *Doughty v. Doughty*, 27 N. J. Eq. 315; Story on Conf. of Laws, sec. 228.

This subject is exhaustively examined in 2 Bishop on Marr. and Div., chap. x. He shows that the right to decree a divorce is founded on domicile, which alone gives jurisdiction, and he quotes the language of Taney, C. J., in *Strader v. Graham*, 10 How. 82, that "every state has an undoubted right to determine the *status* or domestic and social condition of the persons domiciled within its territory;" and approves the language of Burge (Col. and For. Laws, 57) that the *status* of persons is conferred by the laws of the domicile. In sec. 144, Bishop says: "The general proposition under this head is, that the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offense may have occurred, if neither of the parties has an actual, *bona fide* domicile within its territory. It is immaterial to

this proposition, that one or both of the parties may be found temporarily within reach of the process of the court, or that the defendant appears and submits to the suit. This is the firmly-established doctrine in England (so it was said in the earlier editions of this work) and in the United States. The reason on which this doctrine rests is, that a government has no interest or power to change the matrimonial condition of strangers temporarily within its territory; and that seeing every nation may determine the *status* of its own domiciled subjects, such interference by foreign tribunals would be an officious intermeddling in a matter with which they have no concern."

The courts of late have taken strong ground on the subject, and a *bona fide* residence, or domicile, is insisted on before divorce can be granted, which will be valid everywhere else. The flagrant abuses, and collusion arising from what were termed "Indiana divorces," have turned public attention to the matter, and inclined the courts to lay down these salutary principles. The subject has recently been before the courts in connection with divorces obtained in Utah, and the courts have decidedly condemned them on these principles, when either of the parties had not a *bona fide* residence, and consequently no jurisdiction could be obtained. In *State v. Armington*, decided in Minnesota, April, 1878 (see 17 Alb. L. Journal, 451), a divorce granted by a Utah court, where neither of the parties ever acquired a *bona fide* residence in Utah, and were both, during the conduct of the divorce proceedings, residents of Minnesota, was held void in Minnesota, and no protection against punishment for bigamy, and a belief in the validity of the divorce constituted no defense. Cornell, J., in this case, cites and approves the principal case, saying: "To each state belongs the exclusive right and power of determining upon the status of its resident and domiciled citizens and subjects, in respect to the question of marriage and divorce, and no other state, nor its judicial tribunals, can acquire any lawful jurisdiction to interfere in such matters between any such subjects, when neither of them has become *bona fide* domiciled within its limits, and any judgment rendered by any such tribunal, under such circumstances, is an absolute nullity: *Ditson v. Ditson*, 4 B. L. 93; *Cooley on Const. Lim.* 400, and notes there cited; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 Id. 30; *Hanover v. Turner*, 14 Mass. 227."

The position of our courts on this subject may now be considered as definite. The essentials of the marriage contract, the rights and obligations growing out of it, are to be determined by the law of the domicile of the parties; while the form and ceremonies in its celebration are regulated by the *lex loci contractus*. Late adjudications concerning marriages contracted out of the domicile of the parties, and against the positive laws of such domicile, hold these principles. Cases lately determined in North Carolina and Virginia are instructive on this head. In *State v. Kennedy*, 76 N. C. 251, a statute prohibited marriages between negroes and white persons. A negro and a white woman of North Carolina went into South Carolina and were married according to the law of that state which permitted such a marriage, and then returned to North Carolina, where they were indicted for fornication and adultery, and it was held that the marriage was void. The court say: "As to the formalities of the marriage the *lex loci* will govern. But when the law of North Carolina declares that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go, so long as they remain domiciled in North Carolina. And we conceive that it is immaterial whether they left the state with intent to evade the law or not, if they had not *bona fide* acquired a domicile elsewhere at the time of the marriage: *Story Confl. of Laws*, sec. 65; *Williams v. Otes*, 3 Ired. 535. In *Brook v. Brook*, 9 H. L. 193, Lord Camp-

bell says: 'It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile, as contrary to religion, or to morality, or to any of its fundamental institutions.' In that case an Englishman casually met in Denmark the sister of his deceased wife and married her there. As such marriages were prohibited between English subjects it was held void. A law like this of ours would be very idle if it could be avoided by merely stepping over an imaginary line. There are cases to the contrary of this conclusion decided by courts, for which we have great respect. They are cited, and the whole question is learnedly and earnestly discussed by 1 Bishop on Marr. and Div., secs. 371, 389; *Medway v. Needham*, 16 Mass. 157; *Stevenson v. Gray*, 17 B. Mon. 193. It seems to us, however, that when it is conceded, as it is, that a state may by legislation extend her law prescribing incapacity for contracting marriage, over her own citizens who contract marriage in other countries, by whose law no such incapacities exist, as Massachusetts did after the decision in *Medway v. Needham*, the main question is conceded, and what remains is of little importance."

The same point was determined in *Kinney v. Commonwealth*, by the Virginia court of appeals, September, 1878: See Reporter, vol. 6, p. 733. There, a negro man and a white woman, both domiciled in Virginia, where a marriage between such persons is declared absolutely void by statute, left the place of their domicile, and proceeded to the district of Columbia, where marriages between such persons are legal, and were married in accordance with the law of that district. They returned to the place of their domicile after ten days, and lived there together as man and wife. It was held the marriage was absolutely void. An able opinion by Christian, J., in this case refers to *Brook v. Brook*, and *State v. Kennedy*, *supra*.

The doctrine held in these cases is in harmony with *Le Breton v. Nonchet*, 5 Am. Dec. 736.

BRIDGE v. EGGLESTON.

[14 Mass. 245.]

FRAUDULENT CONVEYANCE—GRANTOR'S DECLARATIONS.—Where a conveyance is claimed to have been made in fraud of creditors, the declarations of the grantor prior to the conveyance, with respect to his financial embarrassments, are admissible as evidence of a fraudulent intent on his part.

WRIT of entry. The demandant relied upon his own seisin within thirty years, and a disseisin by the tenant. Plea, the general issue. The demandant claimed under an execution duly levied upon the premises, November 15, 1811, as the property of one Goodwin. The tenant claimed under a conveyance from the said Goodwin, dated October 6, 1809. The demandant, who was admitted to have been a creditor of Goodwin long prior to October, 1809, in consequence of the latter's individual liability as one of the directors of the Berkshire Bank, an in-

solvent corporation, undertook to show that the said conveyance to the tenant was made with intent to defraud the creditors of the said Goodwin; and to prove the same offered evidence of certain declarations of the said Goodwin made prior to the conveyance, in the absence of the tenant, with respect to the probability of his insolvency on account of his liability as a director of the bank, and as to his intention to avoid the payment of as much of his indebtedness as possible. The tenant objected to the evidence, but the court admitted the same with the understanding that knowledge of the facts should be proved upon the tenant prior to the conveyance. A verdict having been returned for the demandant, a motion was interposed for a new trial, and the only question considered by the court was as to the admissibility of the said declarations of Goodwin.

Ashmun, for the tenant, cited *Loker v. Haynes*, 11 Mass. 498; *Worcester v. Eaton*, Id. 368; *Clarke v. Waite*, 12 Id. 439.

Gold and Sedgwick, for the demandant.

By Court, PARKER, C. J. The evidence objected to at the trial, and now made the ground for a motion for a new trial, is that which relates to certain conversations and declarations of Goodwin, the grantor of Eggleston and the judgment-debtor, in the judgment which was attempted to be satisfied by a levy on the land demanded in this action.

The substance of the conversation proved is, that Goodwin expected to be ruined by being connected with the Berkshire Bank as a director; and that he thought it best to pay as little of his debts as possible, and intimated an intention to submit to an imprisonment in Albany, in the state of New York. This conversation took place before the execution of the deed to Eggleston, and he was not present at it. The judge overruled the objection made at the trial, on the ground that, if knowledge of the fact could be proved upon Eggleston, the evidence was proper, and there was afterwards evidence of other declarations of Goodwin, made in the presence of Eggleston, of a similar import, so far as their tendency was to prove the known or expected insolvency of Goodwin, but none in which any intention on his part to conceal his property was intimated.

So far as the conversation tended to prove the insolvency or embarrassment of Goodwin before he conveyed his estate, we think the evidence proper. The fact was essential to be proved in order to establish a motive on his part to make a fraudulent conveyance, and it could not be better proved than by his own

acknowledgment. It is true that Goodwin is a competent witness, if he is not bound by his covenants, or if he is released. But the creditor who is pursuing his debt through a supposed fraudulent conveyance, is not obliged to rely upon the testimony of the principal in the supposed fraud. His conduct, actions, and declarations, before such conveyance is made, are proper subjects to lay before the jury, to enable them to ascertain whether the conveyance, on his part was fraudulent; and such evidence does not prejudice the supposed grantee. If he purchased *bona fide* and for a valuable consideration, without knowledge of such design, his title would not be affected.

There has been much doubt with respect to this species of evidence, different opinions having heretofore prevailed, and no case solemnly decided having settled all the questions which grow out of the subject. It is certain that more laxity or liberality has prevailed with respect to the rules of evidence in inquiries concerning the validity of conveyances supposed to be fraudulent than upon most other subjects. It will be well to establish some precise rules which may make this branch of litigation less trouble—some than it has hitherto been. Now, as the creditor in such cases is obliged to prove actual fraud in the grantor, and a participation in or knowledge of it in the grantee, we think these two branches of his case will admit of the application of evidence of the two parties which, although apparently inconsistent with, is by no means repugnant to the common rules of evidence.

To prove fraud in the grantor, his conduct and his declarations before the conveyance may be the best and often the only evidence within the power of the creditor. He at that time is not interested, nor can it be his design to injure those with whom he may afterwards contract. If fraud is thus proved upon him, then the knowledge of it on the part of the grantee is to be proved; which may be done by showing a trifling consideration, or none at all; by acts inconsistent with the *bona fide* ownership; by confessions of the nature of his bargain; or by other circumstances tending to show a knowledge of the designs of the grantor. Without this latter evidence, the former as to the designs of the grantor is wholly ineffectual to defeat the purchase; and a jury under the direction of the court, will always be able to discriminate; so that the purchaser will not be injured by the declarations of the grantor, unless he be proved to have been privy to his fraudulent designs.

But the declarations, conversations, or even the actions, of a

grantor after making his deed, ought not to be received in evidence in prejudice of the title he has created; because he is interested to have such title defeated by his creditors; and because the other party has a right to examine him upon oath, provided he is a competent witness. Before he has conveyed he is an independent party, whose conduct may be examined to ascertain the causes and motives of his conveyance. Afterwards he has no relation to the estate he has conveyed; and his conversation respecting it, if sworn to on a trial, is mere hearsay, which is never received as evidence.

Two cases have been adjudged which tend to establish this latter principle. The first is that of *Bartlett v. Delprat*, 4 Mass. 702. There the declarations admitted were of a deceased supposed grantor, viz., that he had never made any conveyance to his son. The judge at the trial admitted evidence of that declaration; but a new trial was granted, and the principal reason assigned was, that no case could be found where the declarations of a party, so situated in point of interest, had been received as evidence. The declarations objected to in that case were made after a title was supposed to be created by deed, and tended to contradict and defeat that deed. The other case is that of *Clarke v. Waite*, cited in the argument. There declarations of the grantor, both before and after the execution of the deed tending to show that it was fraudulent, were rejected by the judge at the trial, and his decision was confirmed by the whole court.

This decision does not establish the inadmissibility of declarations made before the deed if connected with evidence of knowledge on the part of the grantee. The adjudication is not to be extended beyond the subject-matter, which was a case of declarations made after the execution of the conveyance, as well as before, without any proffer of evidence tending to show a participation in the fraud by the grantee.

There is nothing, therefore, in any settled decisions to interfere with our opinion in the present case; which is, that the conduct and declarations of the grantor respecting the estate conveyed, and tending to prove a fraudulent intention on his part before the conveyance, is proper evidence for the jury upon an inquiry into the validity of such conveyance, by a creditor or subsequent purchaser, who alleges it to be fraudulent.

Judgment on the verdict.

PEASE v. FOLGER.

[14 MASS. 294.]

INSOLVENT LAWS—WHAT DEMANDS NOT DISCHARGED.—Until demand of payment has been made, the liability of one who has received money to the use of another is not a "debt" within the meaning of an act discharging insolvent debtors from all "debts," etc.

ASSUMPSIT for money had and received. The defendant pleaded a discharge under the insolvent laws of New York, both parties being inhabitants of that state. At the trial it appeared that on the twenty-fourth day of April, 1812, the defendant obtained his certificate of discharge under an act of the legislature of New York "for the benefit of insolvent debtors," and an act supplementary thereto, having filed his petition January 11, 1812, and made his inventory, etc., January 18. On the sixth of February, 1812, he received for the plaintiff, as his agent or attorney, the money sued for in this action upon a debt owing to the plaintiff. This sum was not demanded of the defendant until suit brought. The plaintiff was not named as a creditor in the inventory filed by the defendant, and the money mentioned was not included in the list of his effects. The provisions of the acts referred to are stated in the opinion.

Gola and Howe, for the plaintiff.

Ashmun and Whiting, for the defendant.

By Court, PARKER, C. J. The question to be determined in this action is, whether the demand, which is the subject of it, is barred by the certificate of discharge which the defendant obtained under the insolvent law of the state of New York, passed the third of April, 1811, and the act supplementary to that act, both which have been produced in the case.

By the first act, the certificate is to be a discharge of all debts due at the time of the assignment, and contracted for before that time, although payable afterwards, and it is provided that, if the insolvent debtor be sued, he shall be acquitted of all debts due at the time of the discharge, or contracted for before and payable afterwards. Probably it was contemplated that the discharge would be given at the same time, or immediately after the assignment should be made, and the object of the legislature must be considered to have been to provide for the discharge of debts actually due, on which the time of payment had not arrived.

The provision of the supplementary act applies only to the

case of debts becoming due after the discharge, on account of liabilities incurred at any time before, on certain undertakings expressed in the act. This latter provision is inserted in an act entitled, "an act extending the time for the remission and commutation of certain quit-rents, and for other purposes," a title which would not directly indicate any provision for the relief of insolvent debtors.

Upon reflection, we are satisfied that the demand sued for in this action does not come within either of the acts above referred to, and perhaps we ought to suppose that the defendant did not originally intend to discharge himself of this demand under the certificate, for, if that had been his intention, common justice and his duty as required by the act, demanded that he should have represented this as a debt before his effects were divided, that this creditor, whose debt, if it existed at all, was as much a debt of honor as any one could be, might have received some portion of those effects. But the defendant made no such representation, and justly, because, upon legal principles, he could not be considered debtor, until a subsequent period, when he should be called to account for the money received by him for the plaintiff.

The money received by the defendant was received from an insurance company in New York, in February, 1812, by virtue of authority from the plaintiff. In removing it, the defendant was merely agent of the plaintiff; he being absent at sea when the money became due. No demand appears to have been made upon the defendant until the commencement of this suit; so that he was not a debtor to the plaintiff until that time. For aught that appears, the defendant may have deposited this money for the plaintiff, or separated it from his own money and property, without converting it to his own use; and if such had been the case, it would not have been considered as part of his effects, to be distributed among his creditors.

In this view, the defendant acted honestly and fairly, in not considering himself a debtor to the plaintiff for money which he had received for him, and which he held as his; and his subsequent determination to avail himself of his certificate, to avoid the plaintiff's demand, cannot avail him. There was no debt due before the discharge, which could be affected by the principal act; nor was there any such liability as provided for in the supplementary act; so that the certificate cannot operate in this action, and the plaintiff must have judgment.

TAFT v. MONTAGUE.

[14 Mass. 281.]

NON-PERFORMANCE OF CONTRACT—QUANTUM MERUIT.—A contractor having undertaken to erect a bridge for a town in a particular manner at an agreed price, did his work so unskillfully that the bridge, after being used for a time, fell down and was entirely valueless, and it was held that the town could resist a recovery, either upon the contract or upon the *quantum meruit*, and was not compelled to resort to a cross-action for damages.

ASSUMPT upon a special contract for the erection of a bridge by the plaintiff for the inhabitants of the town of Montague, in a specified manner and at a stipulated price. The declaration also contained a count upon a *quantum meruit* for the same services. Plea, the general issue. It was proved at the trial that the plaintiff built the bridge under a special contract, in 1810, but not in a workmanlike manner, the abutments being made principally of cobble-stones, not well laid together. With occasional repairs, however, the bridge stood until 1812, when the eastern arch fell down. The defendant filled it up, so as to make it passable, and it stood until the autumn of 1814, when the other arch fell in. The defendants again repaired it temporarily, and rendered it passable until September, 1815, when it was all swept away by a flood, and the defendants were compelled to erect a new bridge, of new materials. The judge instructed the jury that if they were satisfied that the plaintiff had failed to perform his special contract, their verdict should be for the defendants, and that nothing was to be allowed on the *quantum meruit*, because the defendants had received no benefit, but had, on the contrary, been put to expense by the plaintiff's unskillful work. There was a verdict for the defendants, and a motion for a new trial, on the ground of misdirection.

Bliss and Mills, for the plaintiff, cited *Broom v. Davis*, 7 East, 480, note; *Everett v. Gray*, 1 Mass. 101.

Ashmun and Strong, for the defendants, cited *Cook v. Jennings*, 7 T. B. 381; *Faxon v. Mansfield*, 2 Mass. 148.

By Court, PARKER, C. J. It would be a reproach to the law if the plaintiff could recover the stipulated price of the work which he undertook to perform, when, by the evidence in the case, it manifestly appears that the defendant would be entitled to a larger sum from him as damages for the non-performance of

this contract with them. He engaged to erect the bridge of proper materials, and in a workmanlike manner. The verdict of the jury proves that he has not performed this contract, and the evidence reported shows a good foundation for such a verdict. It is now urged that he may recover the sum agreed upon, and that the defendants must sue him for their damages.

There are cases in the books in which this course has been held to be necessary. Such is that of *Everett v. Gray*. But there the gun-locks, which were the subject of the contract, had been received, and afterwards proved to be defective; and it was thought that the defendants could not be permitted to show the defect, although arising from fraud in the plaintiff, against his claim for the consideration according to his contract.

The law of that case has since been questioned, and we are certainly not disposed to extend it to cases not exactly similar. The ground of the decision was that the gun-locks were accepted without objection at the time. Now, in the case at bar, there has been no acceptance of the bridge, nor could there have been without some corporate act on the part of the defendants. The mere passing over the bridge was the act of individuals; and the repairing of it was a work of necessity, the town being obliged to have a passage over the stream. The act of repairing by the selectmen cannot, for the same reason, be construed into an acceptance of the bridge in its imperfect state.

We, therefore, think the defense set up is sufficient upon the special count; and as the case negatives the supposition that any of the materials prepared by the plaintiff went to the use of the town, the other counts are not supported.

Judgment on the verdict.

ADAMS v. HOWE.

[14 MASS. 340.]

CONSTRUCTION AND VALIDITY OF STATUTES.—A court of law, when called upon to decide upon the validity of a statute, will presume it to be constitutional until the contrary clearly appears. The legislature is presumed to be the judge, in the first instance, of its constitutional powers, and it is only when manifest assumption of authority, or misapprehension of it appears, that the judicial power should refuse to execute it.

ERROR to the circuit court of common pleas, upon a judgment rendered in an action of trespass for taking and carrying away a heifer, the property of the said Adams, by the defendants in

error. The judgment was rendered for the defendants under a plea of not guilty, upon a special verdict embracing the following material facts: The defendants being the duly chosen and sworn assessors of the town of Rutland for the year 1813, assessed the plaintiff, an inhabitant and taxpayer of the town in the tax bills of that year, in the sum of five dollars and fifty-five cents, for the support of the ministry. The plaintiff having, before said assessment was made, duly filed with the clerk of said town a certificate of his membership in an unincorporated society of Baptists in the town of Barre, in strict conformity with the act of the legislature, passed June 11, 1811, entitled "an act respecting public worship and religious freedom," claimed exemption from said tax, and refused to pay the same. Whereupon the heifer mentioned in the declaration was duly seized and sold by the tax collector for the payment of said tax upon a warrant issued by the defendants. The society to which the plaintiff belonged was of a different denomination from the one mentioned in Rutland, and had no settled minister, but had engaged an ordained Baptist evangelist of a neighboring town to preach to them once a month.

Lincoln, for the plaintiff, cited Stat. 1811, c. 6.

Bigelow, for the defendants, cited *Barnes v. The First Parish in Falmouth*, 6 Mass. 401; *Turner v. The Second Precinct in Brookfield*, 7 Id. 60.

By Court, PARKER, C. J. By the special verdict in this case, it appears that the plaintiff in error was exempted from ministerial taxes, according to the provisions of the Stat. 1811, c. 6, he having regularly obtained and filed with the proper officer of the town a certificate of his membership in a Baptist society in the town of Barre, and such a society being found to exist. It is true, that it also appears that the society of which he was a member, was not incorporated; and that their minister or teacher was not settled over that society, but only engaged to preach to them one Sabbath in a month, he being, in fact, a stated minister of another society in another town. But these latter facts are immaterial provided the statute has legal force and validity; for it expressly puts corporate and unincorporated societies upon the same footing, and makes no distinction between such as have an ordained minister specially settled over them, and such as are occasionally taught by preachers who may be ordained at large, or as ministers of other parishes, devoting a part of their labors and services to them.

The true and only question, then, arising in this case is, whether the statute before cited is contrary or repugnant to the principles of the constitution, and so of no binding force upon the court. And, after a careful examination of the declaration of rights prefixed to the constitution, where alone the subject is treated of, we do not find that the legislature is restricted in the manner contended for by the counsel for the defendants in error.

We are well aware of the great inconveniences, and the injury to public morals and religion, and the tendency to destroy all the decency and regularity of public worship, which may result from a general application of the indulgence granted by the legislature, in that statute, to all persons who may choose to associate, and withdraw themselves from the regular and established religious societies in towns and parishes which, being by law obliged to support public teachers, may thus have their means and power so much diminished as to render that duty oppressive and burdensome. But our duty is to give effect to such acts of the legislature as they have the constitutional authority to make, without regarding their evil tendency or inexpediency. Subsequent legislatures may correct the proceedings of their predecessors, which may be found to have been improvident or pernicious. And if a law, however complained of, is suffered to remain unrepealed, the only legal presumption is, that it is the will of the community that such should be the law.

We proceed to show why the statute in question may be considered as constitutional, and to show that there is no decided case which in any manner contravenes the opinion which we feel ourselves bound to adopt; that the judgment of the circuit court of common pleas is erroneous, and must be reversed.

We must premise that so much respect is due to any legislative act, solemnly passed and admitted into the statute book, that a court of law, which may be called upon to decide its validity, will presume it to be constitutional, until the contrary clearly appears, so that in any case of the kind substantially doubtful the law would have its force. The legislature is, in the first instance, the judge of its own constitutional powers; and it is only when manifest assumption of authority, or misapprehension of it, shall appear, that the judicial power will refuse to execute it. Whenever such a case happens, it is among the most important duties of the judicial power to declare the invalidity of an act so passed.

The act of the legislature, now in question, is supposed to be unconstitutional, in providing for the exemption of persons from taxation to the support of ministers or public teachers of piety, religion and morality, in the towns or parishes within which they may dwell, if they belong to a religious society of a different persuasion, whether that society be incorporated or not. In order to ascertain whether for this cause the act is unconstitutional, we must examine the constitution, to see whether there is any restriction upon the legislature in this respect.

The framers of the constitution, and the people who adopted it in the articles of the declaration of rights, which respect religion and public worship, undoubtedly intended to secure and establish the orderly and regular preaching of the gospel in towns and parishes, and public incorporated societies; and the decent and suitable maintenance of persons of learning and piety, to be set apart as public teachers of religion and morality. This is obvious from the frequent use of the word "public," as applicable to worship, and to ministers and teachers.

Another great object was, to secure and establish the most perfect and entire freedom of opinion as to tenets of religion, and as to the choice of the mode of worship. It was difficult to establish any fundamental rules upon the subject, and they did not attempt it; but contented themselves with declaring the public sentiment upon the subject, and enjoining upon the legislature the importance of providing from time to time such laws as should carry these great objects into effect. It was believed that the future guardians of the moral and religious character of the state, and of the rights of conscience among the people, would be at all times regardful of these important concerns, and would establish such wholesome regulations as would comport with the solemnity of the subject, and the true interests of the people.

It is therefore declared, in the third article of the declaration of rights, "that the people have a right to invest their legislature with power to authorize and require, and the legislature shall from time to time authorize and require the several towns, parishes, precincts, and other bodies corporate and politic, and religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily." And it is further declared in the same article "that the people of this commonwealth have a

right to, and do, invest their legislature with authority to enjoin upon all their subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any whose instructions they can conscientiously and conveniently attend." The right of choosing and contracting with their own teachers is then declared to belong to the public bodies before mentioned; that the money paid by the subject for the support of public worship shall be applied to the support of a teacher of his own denomination, if there be any one upon whom he attends; and that there shall be no subordination or superiority of one sect or denomination over any other.

Three great objects appear to have been the influential causes of the solemn declaration of the will of the people: 1. To establish, at all events, liberty of conscience and choice of the mode of worship; 2. To assert the right of the state in its political capacity to require and enforce the public worship of God; 3. To deny the right of establishing any hierarchy, or any power in the state itself to require conformity to any creed or formula of worship. The restrictions upon the legislature are against any exercise of authority which might contravene the rights of conscience or the choice of forms of worship, and against the establishment of any national or state creed or form of worship, to which those who conscientiously disagreed should be obliged to conform, or suffer any inconvenience from non-conformity. The mode of securing these essential points is left entirely to the legislature, and confidence was reposed in them to maintain them by equal and wholesome laws.

That part of the declaration which enjoins it upon the legislature to exact the support of religious institutions, and attendance upon public worship, is merely directory. If no law had been passed pursuant to it, there could be no penalty upon the citizen for not obeying the clear expression of the public will; nor is there any way of coercing a legislature to carry into effect these important requisitions. So the mode, also, of executing the will of the people in this particular, is left entirely to the legislature; and although laws may be passed which have a contrary tendency, and which in their consequences may injure instead of promoting the public worship, yet the legislature is to judge; and even their erroneous constructions of the design of the people, as expressed in the said declaration, must have legal effect, so far as they are not manifestly repugnant to the principles of the constitution.

This being the character of the legislative power on this all-

important subject, we are at a loss to conceive how it can be restrained when it is professedly exercised for the purpose of enlarging, instead of diminishing, the rights of the citizen on the subject of religious worship. Great responsibility rests upon the legislature, and also upon the people, in delegating power to those who have almost unlimited authority. If they, with a view to secure the rights of conscience, pass laws within the letter of the constitution which may have a tendency injuriously to affect the regular public worship, it is not for the judiciary power to control their course.

The mischief to be dreaded is the breaking up of the parochial religious establishments, by authorizing any number of individuals to withdraw themselves in the easy and loose way which is provided in this act. But they have the authority and they have continually exercised it to incorporate parts of parishes and even individuals as poll parishes, and by this means to diminish the resources of the religious communities from which such corporations are taken. They may incorporate five, ten, or twenty people for this purpose, and there seem to be no more constitutional difficulties in the way of vesting societies unincorporated and the members of them with the same privileges.

This may be an abuse of power for which they are amenable to their constituents, but these acts are not therefore void. It is certainly unjust to leave the standing parishes liable to penalties if they do not maintain a minister, and not to impose any duty of the kind upon those whom they have exempted from the common burden. But in this they merely neglect their duty, and this neglect does not affect the validity of the acts which they may choose to pass. Besides, it is known that there is an existing provision for the relief of towns and parishes from the burden of supporting a minister when they shall become unable to do it, provided no contract is actually in force; for no prosecution can be maintained against a corporation for a neglect of this duty, unless a court has adjudged it to be of sufficient ability.

It has been supposed that according to the principles stated in the case of *Barnes v. The Inhabitants of the First Parish in Fulmouth*, this legislative act is already repugnant to the constitution of the state. But no such inference can be drawn from that case. The question to be settled there was whether the minister of an unincorporated society could maintain an action against the parish for the taxes paid by one of his hearers. The

action was founded altogether upon the supposed constitutional right of the minister in behalf of his hearer, and no legislative act had then been passed tending to vary or affect the natural and obvious meaning of the terms of the articles of the declaration of rights before cited; it being clear by those articles that the privilege of appropriating money paid to another use than that of the town or parish into whose treasury it was paid, applied only when the appropriation was to be made to the use of a teacher of a public society; and that by a public society was intended one known and incorporated. The plaintiff in that suit could not prevail.

That decision was correct, and it was probably to avoid the effect of it that the legislature passed the law in question. It nowhere appears in the learned and elaborate opinion delivered in that case, that the power of the legislature over the subject was questioned. On the contrary, the following expressions may be considered as an admission of that power. The chief justice observed, "that it seems a mistake to suppose that the legislature cannot grant any further relief in particular cases, which in its discretion it may consider as deserving relief." Such relief had been before granted to Quakers, in whose favor no exception had been made by the constitution. The same right exists with respect to Baptists, or those of any other denomination different from that which prevails in the town or which they are inhabitants; and it may be applied in favor of Congregationalists, where they are a minority and dissent from the established worship of the town, or Episcopalians, or any other sect who may unite and form themselves into a separate society.

Whether it is expedient to give legislative sanction to a system so destructive to regular and orderly worship, we again say we are not to judge. We are, however, satisfied that there is nothing in the constitution which prohibits this exercise of power.

One of the objections to the effect of the exemption of the plaintiff in error is, that the society of which he is a member had no settled minister; but hired one only for one Sabbath in a month. But here, again, the legislature has authorized this; not having required, as essential to an exemption, that there should be any minister at all, but only a society and a committee. In the case of *Kendall v. The Inhabitants of Kingston*, 5 Mass. 524, the opinion of the court against the plaintiff's right to recover was founded upon the constitution and the statute of

1799, c. 87, which clearly indicated that the minister who sued must be the minister of the parish, or town, or incorporated religious society, and not have been ordained over the whole religious community to which he belonged.

But the statute of 1811 makes no such requisition; expressly giving the right to the preacher on whom the party taxed shall attend, whether he be ordained at large, or over a particular society; or whether he divide his labors among twenty different societies, or confine them entirely to one. The provision of the act is too broad to exclude the members of any society, large enough to choose a committee, from the enjoyments of its privileges; and it does not appear that even attendance upon public worship anywhere is necessary to secure the exemption.

Judgment reversed.

All the citations of this case refer with approbation to the rule here declared as to determining the validity of a statute; on this it is cited in *Carpentier v. Atherton*, 25 Cal. 569; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 460; *People v. Albertson*, 55 Id. 54; *Colton v. Commissioners*, 6 Fla. 414; *Morrison v. Springer*, 15 Iowa, 348; *Stewart v. Supervisors*, 30 Id. 15; *State v. Cummings*, 36 Mo. 277; *Ash v. Parkinson*, 5 Nev. 35; *Bridges v. Shallcross*, 6 W. Va. 570; *Charles Rio. Bridge v. Warren Bridge*, 6 Pick. 415.

GALE v. WARD.

[14 MASS. 322.]

WOOL-CARDING MACHINES NOT FIXTURES.—Machines in a factory for carding wool, though they cannot be removed without being taken to pieces, are not fixtures, and are liable to attachment as the property of the mortgagor of the building and appurtenances who remains in possession.

ACTION on the case against the defendant as sheriff for not keeping certain chattels attached at the suit of the plaintiff against one Beaton, and for not selling the same on execution. Plea, the general issue. At the trial it appeared that in the suit of the plaintiff against Beaton, the defendant, on the third of February, 1816, attached, among other things, three machines for carding wool in a certain wool-carding factory then occupied by Beaton, but did not remove the same. On the sixth of the same February, the said machines were attached at the suit of other creditors of Beaton by one of the defendant's deputies, who, by their direction, removed the same from the building. The defendant, upon being informed of this, again attached the said machines on the following day in the hands of his deputy

on the first mentioned writ. The plaintiff having obtained judgment in his action against Beaton, sued out execution, and delivered it to the defendant for service. The defendant delivered the execution to his said deputy, who sold the machines and applied the proceeds to the payment of other executions against Beaton, not proved to be entitled to priority. Beaton having no other property subject to execution, the plaintiff directed the deputy to return the execution wholly unsatisfied, and stated that he would resort to the defendant for his remedy. It further appeared that on February 11, 1815, P. and D. Brigham sold and conveyed to Beaton the land on which the factory stood, the deed containing the following language: "Having a wool-carding factory and the appurtenances for carrying on the same, which are comprised in this grant." On the same day, to secure the purchase-money, Beaton gave the said Brighams a mortgage of the premises containing a like description. Beaton remained in possession. There was no other contract between the said parties respecting the machines, except what was contained in the deed and mortgage. The machines stood on the floor of the factory building, not nailed to the floor, or in any manner annexed to the building, unless it was by a leather band running over a pulley which gave motion to the machines. This band could be slipped off, and was occasionally taken off, and the machines removed, when they were repaired. Each machine was so heavy as to require four men to lift it, and had to be unscrewed and taken to pieces to take it out at the door. On February 5, after the service of the plaintiff's attachment, P. Brigham undertook to fasten the machines down by nails or spikes driven into the floor. These nails were drawn out by the deputy sheriff when he removed the machines. Verdict for the plaintiff, subject to the opinion of the court on the facts.

Burnside and Ward, for the defendant.

Lincoln, for the plaintiff, cited *Poole's case*, 1 Salk. 368; *Elwes v. Maw*, 8 East, 38; *Penton v. Robart*, 2 Id. 88; *Taylor v. Townsend*, 8 Mass. 416; *Wells v. Banister*, 4 Id. 514; *Ryall v. Rolle*, 1 Wils. 260; *Vinton v. Bradford*, 13 Mass. 114[*ante*, 119]; *Lyman v. Lyman*, 11 Id. 317.

By Court, PARKER, C. J. The attachment made by the sheriff was incomplete, for want of removing the machines, or of giving such notice of the attachment, by placing them in the

custody of a servant, as would have prevented a second attachment.

They must be considered as personal property; because, although in some sense attached to the freehold, yet they could be easily disconnected, and were capable of being used in any other building erected for similar purposes. It is true that the relaxation of the ancient doctrine respecting fixtures has been in favor of tenants against landlords; but the principle is correct in every point of view, and it is to be considered, where they are removed from the realty by an officer who takes them for the debt of the tenant, that they go substantially to his use. The mortgagees of the building and privilege not being in possession, had no possession of the machines, which were therefore liable for the debts of the mortgagor.

Whether the deputy sheriff, who made the second attachment, did right in satisfying posterior executions out of this property, before the plaintiffs, is a matter to be settled between him and his master, and not a subject of inquiry in the present case. For the sheriff having had it in his power to attach, and having returned that he did attach, is liable for not having the machines to satisfy the plaintiff's execution.

Judgment according to the verdict.

BARNARD v. POPE.

[14 MASS. 434.]

PAROL DECLARATIONS AFFECTING TITLE.—Upon a trial of the right to real property, the verbal declarations of a party respecting his title, which have not been acted upon, are not admissible as evidence.

SEISIN TO MAINTAIN PARTITION SUIT.—Actual corporeal seisin is not necessary to enable a tenant in common to maintain a suit for partition; constructive seisin is sufficient, unless there is proof of an ouster.

PETITION for partition, the petitioner claiming an undivided tenth part of the premises. The respondent pleaded sole seisin in himself, and traversed the seisin of the petitioner, whereupon issue was joined. At the trial it appeared that the premises in question were a part of the estate of the petitioner's father, and that the same descended to the petitioner and his four brothers and five sisters in equal parts on the death of the father. The respondent proved a conveyance in fee-simple of one undivided moiety of the premises from William Barnard, brother of the petitioner, to one Peck, and from Peck to one Folger, and from Folger to the respondent, and offered to prove

the parol declarations of the petitioner, that he had conveyed his share to his said brother William, but the judge rejected the evidence. The respondent also proved a conveyance to himself of another undivided moiety of the premises from the five sisters of the petitioner, and that he, the respondent, had been in continued possession of the premises, claiming them as his own, for about ten years. There was no evidence of an actual ouster, or that the petitioner had ever made any claim to the premises or demanded any part of the rents and profits. Verdict for the petitioner, subject to the opinion of the court as to the admissibility of said parol declarations, and as to the sufficiency of the petitioner's seisin to maintain the suit.

Fay, for the respondent, cited *Bonner v. Proprietors of Kennebeck Purchase*, 7 Mass. 475; *Porter v. Perkins*, 5 Id. 235 [4 Am. Dec. 52]; *Powell on Contracts*, 132, 133.

Draper, for the petitioner.

By Court, PARKER, C. J. The petitioner's title to the proportion set forth in his petition is admitted, and he is entitled to judgment for partition, unless, for one of the causes alleged in the motion for a new trial, the verdict was wrong.

The respondent, who holds one moiety of the land derivatively from William Barnard, the brother of the petitioner, and the other moiety under the deed of his five sisters, offered to prove the declarations of the petitioner, that he had conveyed his share to his brother William; and the evidence so offered was rejected. It not appearing by the report when and where these declarations were made, or to whom, we cannot presume they were made under such circumstances as would prove fraud on the part of the petitioner, like the cases where a first mortgagee or lessee has been postponed in favor of a second in chancery. If it appeared that, when William Barnard conveyed to Peck, the petitioner stood by, knowing that his brother was about conveying a moiety, and had declared that he had conveyed his share to him, the case would be analogous to those alluded to, and would deserve serious inquiry whether so manifest a fraud must prevail in a court of law.

But the declarations offered to be proved might, for aught which appears in the report, have been made long after the conveyance to Peck, and even to the respondent, so as not to have influenced the purchase; and in that case it cannot be supposed for a moment that verbal declarations could operate to defeat a title otherwise unquestioned. If the question had been rela-

tive to the existence of a deed supposed to be lost, or if the circumstances had been such as to justify a presumption by the jury that a grant had been made, declarations of the nature suggested might have been suitable evidence. But no circumstances warranting such an inquiry appear in the case; and if they do exist, some other mode of relief must be sought, for we must decide upon the facts only which are reported by the judge.

The other point relied upon in support of the motion for a new trial, is the supposed want of actual seisin in the petitioner; and the case of *Bonner v. The Proprietors of the Kennebec Purchase*, is thought to be decisive against the petitioner's claim. In the very brief report of that case, it is stated in general terms that actual seisin is necessary in order to maintain this statute process for partition. We apprehend that this general proposition ought to be qualified by a reference to the facts to which it was applied. It appeared in that case that the share claimed by the petitioner had been, more than forty years before, sold by the proprietors by virtue of the authority given them by the statute, for non-payment of taxes, and that, during the whole of that period, it had been occupied under that sale, so that the seisin was not only out of the petitioner, but also out of the proprietors, and the right of entry was lost to them both. Under such circumstances, there was nothing to make partition of. The petitioners were not interested in common with the respondents, or any other person; and if their share had been unjustly or irregularly transferred, their remedy was against the proprietors, who had caused the mischief. We think it cannot be inferred from that decision that an actual corporeal seisin is necessary to enable a tenant in common to maintain this process. If it were so, this beneficial remedy would be much restricted in its operation; and it would always be in the power of one tenant, by ousting his co-tenant, to drive him to a writ of entry, which it certainly was not the intention of the legislature or of the court to do.

It is true, that by the common law and the English statutes, the writ of partition cannot be maintained by one tenant in common, who is disseised; not even if the disseisin is by the co-tenant: Co. Lit. 167, a. But every dispossession does not amount to a disseisin, especially of tenants in common. For the possession of one is the possession of all, unless by an actual ouster, or an exclusive pernaney of the profits, against the will of the others, one shall manifest an intention to hold the land by wrong,

rather than by the common title. But without such overt acts, or a sole and exclusive possession for more than twenty years, so that the right of entry shall be gone, a disseisin is not to be presumed. All the tenants in common may, therefore, be actually seised in the sense in which those terms are used in the case before referred to; and we think this is the sense in which the court applied them, for the facts in that case required it.

In the case at bar, there had been a sole possession by the respondent of the whole land, under a supposed title, only for ten years. There has been no actual ouster, nor any refusal to account for the rents or profits. The right of entry remained at the time of filing the petition; and under these circumstances we are clear that there is a sufficient seisin to maintain the process.

Judgment on the verdict.

The doctrine of this case that every dispossession of a tenant in common by a co-tenant, does not amount to a disseisin, but that the possession of one is to be deemed the possession of all unless there be an actual ouster or a strictly adverse possession of the premises and an exclusive pernanacy of the profits, was followed in *Munroe v. Luke*, 1 Met. 459; *Means v. Wells*, 12 Id. 356; *Bayless v. Bussey*, 5 Maine, 153; *Campbell v. Galbreath*, 5 Watts, 423; *Müller v. Dennett*, 6 N. H. 109; *Foust v. Moorman*, 2 Ind. 17; *Lamb v. Starr*, Deady 350, the decisions all citing the principal case. In *Marshall v. Crehore*, 13 Met. 462, the court say: "No judicial decision has occurred to affect the authority of *Barnard v. Pope*," and hold that the rule laid down, that a tenant in common out of possession, if his right of entry still remains, may maintain a suit for partition, is not disturbed by the change in the law of Massachusetts. Under the statutes of 1783, c. 41, sec. 1, which were in force when *Barnard v. Pope* was decided, "any person interested with others in any lot, tract of land, or other real estate," might have partition. The provision of the Revised Statutes, c. 103, sec. 1, 2, in force when *Marshall v. Crehore*, was decided, was that "all persons holding lands as joint tenants, coparceners, or tenants in common may be compelled to divide the same," and that "any one or more of the persons so holding lands may apply, by petition, for partition of the same." From the obvious necessity of the case it requires stronger evidence to establish such an adverse possession by a tenant in common as will bar a co-tenant's right to partition than will suffice to set the statute of limitations in operation against a mere stranger: *Munroe v. Luke*, *supra*. And "it would seem that even adverse possession short of the period required to confer a title by the statute of limitations, does not always work such a disseisin as will oust the right to apply for partition," though the tenant out of possession may have the right to elect to treat it as a disseisin for the purpose of bringing ejectment: *Hawley v. Soper*, 18 Vt. 320, citing the principal case. But there must be something more than a mere right of entry to sustain a suit for partition. Thus where a creditor levied an execution upon an undivided portion of his debtor's land, it was held that he could not maintain a petition for partition against such debtor but must bring ejectment, because there was never any privity between them: *Brock v. Eastman*, 28 Vt. 658,

referring to the principal case. One who has not an estate in possession in the premises cannot have partition. Hence this remedy will not lie for an estate in remainder after a life-estate: *Brown v. Brown*, 8 N. H. 93; *Nichols v. Nichols*, 28 Vt., citing the principal case.

And under a statute of Massachusetts limiting this remedy to those having estates in possession, it was decided that it would not lie for a grantee of the reversioner who had made a lease for years of the premises which was yet unexpired: *Humwell v. Taylor*, 6 Cush. 472. For other decisions where the principal case is cited and relied upon, see *Carpenter v. Thayer*, 15 Vt. 552; *Abercrombie v. Baldwin*, 15 Ala. 369; *Rangely v. Spring*, 28 Maine, 127; *Copeland v. Copeland*, Id. 525. The three last-mentioned cases approve and follow the intimation of the chief justice in the principal case, that if one pretending to an interest in an estate should stand by and permit another to sell it as his own, he will be estopped to claim such interest afterward. A collection and very able review of the authorities as to what is necessary to constitute an adverse possession, such as will bar a tenant in common's right to partition, will be found in the dissenting opinion of Christiancy, C. J., in *Dubois v. Campan*, 28 Mich. 304, where the principal case is cited. See also *Clapp v. Bromagham*, 9 Cow. 572, where the authority of the principal case on this point seems to be accepted with some hesitation.

WHITNEY v. DUTCH.

[14 MASS. 457.]

RATIFICATION OF INFANT'S CONTRACTS.—There need not be a direct promise to pay on the part of an infant after coming of age, to ratify a contract made during his minority; any words will be sufficient which import an express recognition and confirmation of the contract.

INFANT PARTNER.—A promissory note made for a partnership debt and in the firm name, by an adult partner, is not void as to his infant copartner, but voidable, and may be ratified by the latter on his coming of age.

ASSUMPTION on a promissory note purporting to have been made by the defendant Dutch and one Thomas Green. The defendant Dutch was defaulted, and the defendant Green pleaded: 1. The general issue; 2. That he was under age when the note was made. The plaintiffs replied that after he came of age he agreed to and confirmed the promise, to which he rejoined that he did not so agree. The facts were that Dutch and Green were partners while the latter was under age; that Dutch made the note in question in the firm and style of Dutch & Green, and that after Green came of age the plaintiffs applied to him for payment of the note, when he acknowledged that it was due, and promised that upon his return home he would endeavor to procure the money and send it to the plaintiffs, but said that it was hard for him to pay it twice, and that Dutch had taken all the stock and agreed to pay all the debts. There was a verdict

for the plaintiffs on both issues, subject to the opinion of the court upon these facts.

Leland, for the defendant, cited 1 Comyn's on Contracts, 163, *Martin v. Mayo*, 10 Mass. 440 [6 Am. Dec. 103]; *Watson's Law of Partnership*, 167; *Saunderson v. Marr*, 1 H. Bl. 75; *Zouch v. Parsons*, 8 Burr. 1804; 2 Lev. 144; 1 Salk. 279.

Thurston, for the plaintiffs, cited 1 Roll. Abr. 780; 9 Vin. Abr. 384.

By Court, PARKER, C. J. The question presented to the court in this case, which has been argued, is, whether the issue on the part of the plaintiffs is maintained by the evidence reported.

The first objection taken by the defendant's counsel is, that no express promise is proved after the coming of age of the defendant. By the authorities, a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority. The distinction is undoubtedly well taken. The reason is, that a mere acknowledgment avoids the presumption of payment, which is created by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledges the debt or not; and some positive act or declaration, on his part, is necessary to defeat his power of avoiding it.

But the terms of the ratification need not be such as to import a direct promise to pay. All that is necessary is, that he expressly agrees to ratify his contract; not by doubtful acts, such as payment of part of the money due, or the interest; but by words, oral or in writing, which import a recognition and a confirmation of his promise.

In the present case, the defendant acknowledged that the money was due, when called upon to pay the demand; and promised that he would endeavor to procure the money on his return home, and send it to the plaintiff. This was sufficient to satisfy the jury that he assented to and ratified the original promise; for it would be a distortion of language to suppose that he meant only to endeavor to persuade Dutch to pay the money; and, if he succeeded, that he, Green, would send it to the plaintiff.

But the other point made in the defense is more difficult, and presents a question new to us all. This is, that the note being signed by Dutch for Green, was void in regard to Green; because he was not capable of communicating authority to Dutch

to contract for him; and that, being void, it is not the subject of a subsequent ratification. No such question appears to have occurred in our courts, nor in those of England, or of the neighboring states. Partnerships have not been uncommon between adults and infants; and simple contracts, signed by one for both, undoubtedly have often been made.

It is unfavorable to the principle contended for by the counsel for Green, that no such case has been found; for this silence of the books authorizes a presumption that no distinction has been recognized between acts of this kind done by the infant himself and those done for him by another. We must, however, examine the principles by which the contracts of infants are governed, and see, if, by any analogy to settled cases, the present defense can be maintained.

It is admitted generally that a contract made by an infant, although not for necessities, is only voidable; and that an express adoption of it, after he becomes of age, will make it valid from its date. Nor does the law that he shall be sued, as upon the new promise; but gives life and validity to the old one, after it is thus assented to. But it is urged that this doctrine applies only to those contracts which are made by the infant personally; and that the delegation of power by him to another of full age, to act for him, is utterly void; and that no contract, made in virtue of such delegation, can subsist, so as to be made good by subsequent agreement or ratification.

If we confine ourselves to the letter of the authorities, it would seem that this doctrine is correct; for we find that in the distinction made in the books between the void and voidable acts of an infant, a power of attorney is generally selected, by way of example, as an act absolutely void; unless it be made to enable the attorney to do some act for the benefit of the infant, such as a power of attorney to receive seisin, in order to complete his title to an estate.

The books are not very clear upon this subject. All of them admit a distinction between void and voidable acts; and yet disagree with respect to the acts to be classed under either of those heads. One result, however, in which they all appear to agree, is stated by Lord Mansfield, in the case of *Zouch v. Parsons*, cited in the argument, viz.: that whenever the act done may be for the benefit of the infant, it shall not be considered void; but that he shall have his election when he comes of age, to affirm or avoid it; and this is the only clear and definite proposition which can be extracted from the authorities.

The application of this principle is not, however, free from difficulty; for when a note or other simple contract is made by an infant himself, it may be made good by his assent, without any inquiry whether it was for his benefit or to his prejudice. For if he had made a bad bargain in a purchase of goods, and given his promissory note for the price, and when he came of age had agreed to pay the note, he would be bound by this agreement, although he might have been ruined by the purchase. Perhaps it may be assumed as a principle that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal *substratum* for a future assent until avoided by the infant; and if, instead of avoiding, he confirm them when he has a legal capacity to make a contract, they are in all respects like contracts made by adults.

With respect to contracts under seal, also, they are in legal force as contracts until they are avoided by plea. Whether they can, in all cases, as it is clear they can in some, such as leases, be ratified so as to prevent the operation of a plea of infancy, except by deed, need not now be decided. A deed of land by an infant having the title would undoubtedly convey a seisin; and the grantee would hold his title under it until the infant or some one under him should by entry or action avoid it.

Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void; although no satisfactory reason can be assigned for such a position. But as this is a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants, it is not necessary nor reasonable to draw inferences which may be repugnant to the principles of justice, which ought to regulate contracts between man and man.

The object of the law in disabling infants from binding themselves, is to prevent their being imposed upon and injured by the crafty and designing. This object is in no degree frustrated by giving full operation to their contracts, if, after having revised them at mature age, they shall voluntarily and deliberately ratify and confirm them. It is enough that they may shake off promises, and other contracts, made upon valuable consideration, if they see fit to do it, when called upon to perform them. To give them still another opportunity to

retract, after they have been induced by love of justice, and a sense of reputation, to make valid what was before defective, will be to invite them to break their word and violate their engagements.

If it be true that all simple contracts made by infants are only voidable, the inquiry in this case should be whether the facts stated furnish an exception to this general rule, or whether the contract now sued is in any sense different from a simple contract. The only ground for the supposed exception is, that the note declared on was not signed by the infant himself, but by Dutch, claiming authority to sign his name as a copartner. If the authority required a letter of attorney under seal, the exception would be supported by the authorities which have been alluded to.

But it is well known that copartners may, and generally do undertake to bind each other, without any express authority whatever. Indeed, the authority to do so results from the nature and legal qualities of copartnership. And without any such union of interests, one man may have authority to bind another by note or bill of exchange, by oral or even by implied authority. The case of a deed, therefore, is entirely out of the question, so that the defendant does not bring himself within the letter of the authorities, and certainly not within the reason on which they are founded. Then, upon principle, what difference can there be between the ratification of a contract made by the infant himself and one made by another acting under a parol authority from him? And why may not the ratification apply to the authority as well as to the contract made under it?

It may be said that minors may be exposed if they may delegate power over their property or credit to another. But they will be as much exposed by the power to make such contracts themselves, and more, for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources, that infants cannot be prejudiced; for the contracts are in neither case binding; unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case, justice requires that they should be compelled to perform them.

Upon these principles we are satisfied with the verdict of the jury, and are confident that no principles of law or justice are opposed by confirming it.

Judgment on the verdict.

This is one of the cases reported in Mr. Ewell's *Leading Cases on Infancy*, 38, where an excellent note will be found. It is also frequently cited elsewhere in Mr. Ewell's work. The doctrine here laid down may seem to conflict with the rule upon the subject of the contracts of infants, stated in the note to *Tucker v. Moreland*, and *Vasee v. Smith*, 1 Am. Lea. Cas. 242, quoted ante in the note to *Oliver v. Houdlet*, that an appointment of an attorney by an infant is absolutely void. The editors say, however, in a foot-note at page 247: "*Whitney v. Dutch*, decided in 14 Mass. 457, the decision in which may appear to conflict with this position, was special in being a case of partnership, and the indorsement of the infant's name by his major partner. If the partnership was not void, as it was not but only voidable, the act of indorsement, which, as an incident to the partnership, the major partner had a general power to do, was perhaps not void but only voidable by the infancy. The incidental power partook of the character of the principal contract, and, in truth, partners are not strictly agents of each other. Each in a kind of way has individual power over all partnership property: *Hardy v. Waters*, 38 Maine, 450, in which it was decided that an infant might by parol authorize an indorsement of his note which would be voidable only, appears to have proceeded on a want of observance of the true effect of *Whitney v. Dutch*; and that case was followed reluctantly as an authority binding on the courts of Maine, which state, when *Whitney v. Dutch* was decided, 1817, formed a part of Massachusetts." As will be seen, the annotators seem to have mistaken the principal case for a case of indorsement of a note, whereas it was in fact a case of the making of a note on behalf of an infant by his adult partner. Their explanation, however, is not weakened by this fact. The general, if not universal rule of the cases seems to be that an appointment by an infant of an attorney or agent, which requires to be made under seal is absolutely void: *Dexter v. Hall*, 15 Wall. 9; *Lawrence v. McArter*, 10 Ohio 37; *Pyle v. Cravens*, 4 Lit. (Ky.), 17; *Trueblood v. Trueblood*, 8 Ind. 195, but beyond this the decisions are not in harmony. The tendency undoubtedly is, however, to restrict the application of the rule above stated within the very letter of it, and to hold all acts and contracts of an infant beyond that voidable only: See note to principal case in Ewell's *Leading Cases*, 38. But in *Semple v. Morrison*, 7 B. Monr. 298, it was held that an infant's appointment of an attorney or agent by parol was equally void with one made under seal. The principal case is cited in *Fetrow v. Wiseman*, 40 Ind. 148; *Elliott v. Horn*, 10 Ala. 248; *Tucker v. Moreland*, 10 Pet. 58; *Hale v. Gerriah*, 8 N. H. 374; *Dexter v. Hall*, 15 Wall. 9; *Thompson v. Lay*, 4 Pick. 49; *Kendall v. Lawrence*, 22 Pick. 543; *Reed v. Bachelder*, 1 Met. 560; *Boyden v. Boyden*, 9 Met. 521; *Bradford v. French*, 110 Mass. 366; *Owen v. Long*, 112 Mass. 403; *Hastings v. Dollarhide*, 24 Cal. 195; *Hardy v. Waters*, 38 Maine, 450, and indeed in nearly all the later American cases involving the question of the void or voidable nature of an infant's contracts.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

WILLIAMS v. GRANT.

[1 Conn. 487.]

LIABILITY OF COMMON CARRIER.—A common carrier, undertaking generally the carriage of goods, is liable for all losses except such as are occasioned by the act of God, the act of the public enemies, or the act or default of the party sending the goods.

ACT OF GOD.—The term “act of God,” comprehends all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent. The striking of a vessel upon a rock not generally known to the master, is *prima facie* an act of God, for which the carrier is not responsible.

ACTION on the case against the defendants as common carriers. The declaration stated that the defendants being owners of a vessel used by them for transporting goods for hire, received on board four hundred and fifty bushels of salt belonging to the plaintiffs to be transported from Providence to New York; that while the vessel was proceeding down Providence river, by the negligence and unskillfulness of the master, and in consequence of his ignorance of the navigation of that river, she struck upon a rock, so that plaintiff's salt was ruined and lost. On the trial it was admitted, that the defendants undertook to transport the salt on board their vessel of about twenty tons for hire. A bill of lading was given in the usual form. While on her passage, under a moderate breeze and fair weather, she ran against a rock, in consequence of which the salt was lost. The plaintiff showed that the rock was well and generally known; that the vessel was out of her course; that the master was not acquainted with the navigation; that it was usual to have a pilot, but none was taken.

The court charged the jury, that if they should find from the evidence that the rock was generally known, the loss would be imputable to the negligence of the defendants, and they must return a verdict for the plaintiff, but if they should find it was not generally known, then the loss was occasioned by a peril of the sea, and their verdict must be for the defendants. The jury found a verdict for the defendants, and a motion for a new trial was made.

Cleaveland and T. S. Williams, in support of the motion, argued that a common carrier is somewhat an insurer. The carrier is not exempt in a case of robbery: *Barclay v. Heygena*, 1 T. R. 83. The absence of negligence alone does not excuse: *Morse v. Sluce*, 1 Vent. 190, 238; *Forward v. Pittard*, 1 T. R. 27, 33; *Coggs v. Bernard*, 2 Ld. Raym. 918; *Gibbon v. Paynton*, 4 Burr. 2300; *Dale v. Hall*, 1 Wils. 282; *Hyde v. Trent Navigation*, 5 T. R. 394; *Elliot v. Rossell*, 10 Johns. 1 [6 Am. Dec. 306]. But every loss is to be imputed to negligence which might have been avoided by human foresight: *Trent Navigation v. Wood*, 3 Esp. 181; *Abbot on Shipping*, pt. 3, ch. 4, secs. 1, 8; *Colt v. McMechen*, 6 Johns. 168 [5 Am. Dec. 200]. The neglect to obtain the services of a pilot shows the defendant guilty of negligence: *Law v. Hollingsworth*, 7 T. R. 160; *Bell v. Reed*, 4 Binn. 127 [5 Am. Dec. 398].

Daggett, *contra*, cited *Buller v. Fisher*, Abbott, pt. 3, c. 4, sec. 5, showing the accident was due to a peril of the sea, and to the same effect: *Amies v. Stevens*, 1 Str. 128; *Colt v. McMechen* [5 Am. Dec. 200].

By Court, SWIFT, O. J. Common carriers are liable for the loss of goods entrusted to their care, in all cases, except where the loss arises from the act of God, the enemies of the state, or the act, or the default of the party sending them. Under the term "act of God," are comprehended all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent, and in cases of this description, they may be liable for a loss arising from an inevitable necessity existing at the time of the loss, if they had been guilty of a previous negligence or misconduct, by which the loss may have been occasioned.

If the rock on which this vessel struck had been generally known, and the master did not actually know it, then if he conducted properly in other respects, and no fault was imputable to him, his striking on the rock would be an act of God, an unavoidable accident, and he would not be liable for the loss.

For though the rock had been there for ages, yet if it had never been discovered before, it is the same thing as if it had been created and placed there immediately before the accident happened. The charge of the court to the jury on this point was correct.

In this case, however, the plaintiffs offered evidence to prove that the master was ignorant of the navigation; that he had no pilot, as was customary, and that the vessel went out of the usual course. It does not appear but that the running of the vessel on the rock may be attributed to this negligence. Of course, the court should have submitted these facts to the jury, and should have instructed them, that though the situation of the rock was not generally known, yet if they found the other facts to be true, so that the loss was imputable to the negligence of the master, then he was liable for it, and they must find a verdict for the plaintiffs. For this reason I would advise a new trial.

TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN, and HOSMER, JJ., concurred.

GOULD, J., delivered a concurring opinion.

New trial granted.

Followed and relied on in *Crosby v. Fitch*, 12 Conn. 418; *Hall v. Conn. River Co.*, 13 Id. 326; and *Gage v. Tirrell*, 9 Allen, 309.

SALMON v. BENNETT.

[1 Conn. 525.]

CONVEYANCE IN CONSIDERATION OF NATURAL AFFECTION.—Where a conveyance was made to a child in consideration of natural affection, without a fraudulent intent, when the grantor was unembarrassed, the gift constituting but a small portion of his estate, and the provision being reasonable, it was held that such conveyance was valid against a creditor at the time of the conveyance.

EXECUTMENT for three pieces of land. The general issue was pleaded. It was admitted that one Sherwood was formerly the owner of the demanded premises. The plaintiff claimed title under an execution against Sherwood in 1811; and the defendant through a deed from Sherwood to his son on consideration of natural affection, which was known to defendant at the time he took title. It was claimed the deed was void, as the plaintiff's claim was founded on a claim subsisting before the execution of the deed to the son. The defendant proved that

Sherwood, when he conveyed to his son, was not indebted, except to the plaintiff, and that the land conveyed was not more than one eighth part of his real estate. But it was admitted, that long before the levy of the execution, he had conveyed by several deeds all his real estate, and was at that time entirely destitute of property. Upon these facts the plaintiff contended that the deed from Sherwood to the son was fraudulent as against him. The defendant, on the other hand, insisted that the deed was not void, not being made to defraud creditors. The court reserved the case for the consideration and advice of the nine judges.

Daggett and N. Smith, for the plaintiff, contended: 1. That a deed of gift is void against any creditor who is such at the time of the conveyance: *Doe v. Manning*, 9 East, 59. In *Parker v. Proctor*, 9 Mass. 390, the conveyance was held good; but there the creditor became such after it, and with notice of it; 2. That the defendant, having purchased the premises with notice, has no better title than the son.

Sherman and T. S. Williams, contra. The circumstance that the conveyance was a voluntary one, is merely presumptive of fraud: *Newland on Contr.*, 384; *Russel v. Hammond*, 1 Atk. 15; *Walker v. Burrows*, Id. 93; *Stephen v. Olive*, 2 Bro. C. C. 90; *Lush v. Wilkenson*, 5 Ves. jun. 384; *Parker v. Proctor*, 9 Mass. 390; *Bennett v. Bedford Bank*, 11 Id. 421; *Verplank v. Sterry*, 12 Johns. 558 [post]. The defendant being a purchaser for a valuable consideration, with notice of the voluntary conveyance, is to be favored: *Newport's case*, Skin. 423; *Prodgers v. Langham*, 1 Sid. 133; *Porter v. Clinton*, Comb. 222; *Kirk v. Clark*, Prec. in Chan. 275; *George v. Milbanke*, 9 Ves. jun. 190; *Jackson v. Henry*, 10 Johns. 185, 197 [6 Am. Dec. 328]; *Fletcher v. Peck*, 6 Cranch, 87, 113, 135; *Hamilton v. Greenwood*, 1 Bay, 171 [1 Am. Dec. 607].

By Court, SWIFT, C. J. Fraudulent and voluntary conveyances are void as to creditors; but in the case of a voluntary conveyance, a distinction is made between the children of the grantor and strangers. Mere indebtedness at the time will not, in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child in consideration of love and affection; for if all gifts by way of settlement to children, by men in affluent and prosperous circumstances, were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce

a greater evil than that intended to be remedied. Nor will all such conveyances be valid, for then it would be in the power of parents to provide for their children at the expense of their creditors. Nor is it necessary that an actual or express intent to defraud creditors should be proved, for this would be impracticable in many instances where the conveyance ought not to be established. It may be collected from the circumstances of the case. But in all cases where such intent can be shown, the conveyance would be void, whether the grantor was indebted or not.

In order to enable parents to make a suitable provision for their children, and to prevent them from defrauding creditors, these principles have been adopted, which appear to be founded in good policy. Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child, according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unincumbered for the payment of the grantor's debts, then such conveyance will be valid against conveyances existing at the time. But, though there be no fraudulent intent, yet if the grantor was considerably indebted, and on the eve of a bankruptcy; or if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts, then such a conveyance will be void as to creditors. In the case under consideration, it is manifest there was no fraudulent intent; the gift constituted but a small part of his estate; was a reasonable provision by the father for the son, according to their condition and circumstances, and much more than sufficient for the payment of the debt due to the plaintiff remained in the hands of the grantor. I am, therefore, of opinion that the indebtedness of the grantor at the time of the conveyance, the only circumstance that can operate against it, is not such as ought to set it aside, especially as a great length of time has elapsed, and the estate is passed into the hands of a *bona fide* purchaser for a valuable consideration.

TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN, GODDARD and HOSEMER, JJ., concurred.

GOULD, J., delivered a concurring opinion.

Judgment for defendant.

In *Whittlesey v. McMahon*, 10 Conn. 142, this case is styled a leading case in Connecticut on the subject of voluntary conveyances, and the language of Swift, C. J., showing when such conveyances are void, is quoted with approbation. The case is again referred to in *Abbe v. Newton*, 19 Conn. 27, the court saying: "In the case of *Salmon v. Bennett*, the validity of a voluntary conveyance against the claims of a creditor whose debt existed at the time, was considered; and the principles upon which it was thought such conveyances ought to rest, were laid down by the court with great clearness and precision. That decision, so far as it goes, has ever been considered as settling the law of the state on the subject. It has, indeed, been doubted on the ground of its going too far in upholding such conveyances; but not to our knowledge, on the ground that the principles designed to guard against fraud, are there laid down with too much strictness or rigor."

The case is relied on in *Beal v. Warren*, 2 Gray, 456. See *Verplank v. Sterry*, *post*, for an instructive case in this connection.

AVERY v. STEWART.

[2 Conn. 69.]

TIME ON NOTE, HOW COMPUTED.—In computing the time on a promissory note payable in a certain number of days, after date, the day of the date is to be excluded.

NOTE DUE ON SUNDAY.—Where a non-negotiable promissory note, payable sixty days from date, fell due on Sunday, a tender on the following Monday was held good.

USAGE TO EXPLAIN WRITING.—Upon a note payable in cotton yarn at "wholesale factory prices," evidence of the usage among manufacturers and dealers is admissible to show the meaning of those terms.

TENDER, WHEN SEASONABLE.—Where a contract is payable at a certain time and place, in specific articles, and the debtor is at the place appointed at a seasonable hour before sunset on the day fixed, prepared to make delivery, and the creditor neglects to attend to receive the articles, a tender after sunset will be good. (GOULD, J.)

ACTION on a promissory note of the following tenor:

Lisbon, December 6, 1815.

"For value received, we jointly and severally promise Samuel Avery and Son, in sixty days from date, seven hundred and thirty-four dollars and seventy-six cents, in cotton yarn, at ten per cent. below the wholesale factory prices, to be delivered at the Lisbon Cotton Factory Store.

"JOSIAH ROSE, as Agt. L. C. F.

"ALEXANDER STEWART."

The defendants pleaded in bar that the fourth day of February, 1816, was Sunday, and that on the next day they made a sufficient tender of the goods in full payment of said note, which plea was traversed by the plaintiffs, and issue joined. At the trial, there was evidence to prove that February 4, 1816,

being Sunday, the defendants called on the plaintiffs in the forenoon of next day, and informed them that they, the defendants, should on the same day, at the Lisbon cotton factory store, tender the goods specified in the note, and that the plaintiffs replied that they should do nothing about it; that the defendants waited at the place appointed until sunset of said day to deliver said goods, but that the plaintiffs were not there to receive them; and that thereupon, after sunset of said day, the defendants made a tender to the plaintiffs of cotton yarn of good merchantable quality, warp and woof, at ten per cent. below the wholesale factory prices according to a tariff fixed by a usage long established among the cotton manufacturers of Connecticut and the neighboring state of Rhode Island, which usage was known to the plaintiffs, but that the plaintiffs refused to receive said yarn, and that the defendants then deposited the same in said store for the use and benefit of the plaintiffs. The plaintiffs contended that the wholesale factory prices mentioned in the note meant the actual wholesale prices in the market, and offered evidence to prove what those prices were. The court instructed the jury in substance: 1. That if a debtor in a contract for the delivery of specific articles is at the place appointed on the day named prepared to make delivery of the goods in season for making and completing the tender before sunset, and the creditor is absent, so that a tender cannot be made to him in person, a tender after sunset by daylight is good; and, 2. That if the jury believed from the evidence that the parties meant by "wholesale factory prices," the ticket prices fixed by the usage before referred to, and that the defendants on the fifth day of February, 1816, made a tender to the plaintiffs of a sufficient quantity of cotton yarn according to those prices, although they might not be the same as the actual market prices, then the verdict must be for the defendants. There was a verdict for the defendants, and the plaintiffs moved in arrest of judgment, on the ground that the issue on the plea was immaterial, and for a new trial on the ground of misdirection, upon which the questions were reserved for the consideration of all the judges.

Cleveland, for the plaintiffs, cited *Castle v. Burdett*, 3 T. R. 623.

Halsey and Sherman, for the defendants.

By Court, SWIFT, C. J. Where a note or other obligation is payable in a certain number of days from the date, the day of

the date is always excluded in the computation of the time. This note was then payable on the sixtieth day after the date, which it is agreed was Sunday. It has been argued that as this note was payable within sixty days, the defendant, as it was unlawful for him to tender payment on the last day, because it was Sunday, was bound to pay it on the preceding day. But where a note is made payable within a certain number of days, the promisor is not bound to tender payment till the last day; and no suit can ever be maintained against him for non-payment prior to the last day. Of course, a note payable within a certain number of days is payable on the last day, in the same manner as if that had been specified to be the day of payment.

If a note should be made payable on Sunday, in express terms, it would be void, because it would be a contract to do an unlawful act. But if it be payable at a future day, which by calculation is found to be Sunday, and the parties did not intend to make it payable on Sunday, then it would not be void. The question then is, if a note falls due on Sunday, whether the tender must be on the preceding or succeeding day. The obligor cannot be bound to tender on the preceding day, for no man is bound to perform a contract before the time of payment; and no action can ever lie against him for non-performance before that time. Though he cannot perform the contract on the day it falls due, because it would be an unlawful act, yet that does not exonerate him from his obligation. It would be unjust to subject him to pay damages for the non-performance of a contract when it was unlawful to do it. The only way, then, to do justice to both parties is to permit the tender to be made on the succeeding day; and this is conformable to a general principle of law, that where the obligor cannot perform a contract according to the literal terms of it, he shall perform it as nearly as possible. This violates no principle, and does justice to all the parties. I think, then, the correct rule is that when an obligation falls due on Sunday, the obligor shall be bound to tender a performance of it on the succeeding day.

It is said, in the case of bills of exchange and negotiable notes, where days of grace are allowed, that they are by the custom of merchants, sanctioned by law, payable on the third day of grace; yet if that day happens to be Sunday, then they are payable on the preceding day; and that this principle applies to the case in question. But the same custom of merchants which has indulged three days of grace after a note is due, if that day is not Sunday, allows but two where it is Sun-

day; and it being an indulgence, it is perfectly consistent to require payment on the second day of grace, to avoid giving four days of grace; but this is a very different thing from requiring a note to be paid before it is due.

By the words, "wholesale factory price," could not have been intended the cash price, but must have referred to some general rule known to cotton manufacturers. It was, therefore, proper to leave it to the jury to ascertain by the evidence, as a matter of fact, what was the wholesale factory price. The tender was made at a proper and reasonable time, under all the circumstances. I would not advise a new trial.

HOMER, J. I concur with the chief judge, except in relation to the tender. I think that was too late. The note was executed on the sixth day of December, and was payable in sixty days from its date. If the day of the date is included, the note fell due on Saturday; if it is excluded, Sunday became the sixtieth day, or day of payment. When a person promises to do an act on a future day, which is Sunday, he knows that his promise cannot literally be fulfilled. It must be performed the day before or the day after the one prefixed; on which of those days is matter of construction. The correct principle, in my opinion, is this: that the performance shall be as near the agreement as possible, but must not include a longer period than the one which the contract expressly assumes.

It is a general rule, "that when a computation is to be made from an act done, the day in which the act was done is to be included:" *Rex v. Adderley*, Doug. 462, 464; *Castle v. Burditt*, 3 T. R. 623; *Glassington v. Rawlins*, 3 East, 407. The act which gives existence to a deed, is the delivery of it. Rejecting all considerations arising from usage, or the necessity of giving such a construction as shall render the deed available, the day of the date of the promissory note under discussion would be included. But the custom of merchants has settled the point differently. The day of the date is excluded from calculation: *Chitty on Bills*, 338. The note then being, by the express appointment of the parties, payable on Sunday, what is the legal construction of this promise? I answer, that the note became due on Saturday. The words of the contract are equally disregarded, whether the note is considered to have fallen due on Saturday or on Monday. It cannot be construed according to the letter. The parties knew that the note could not be paid on Sunday, and they must have intended it should be performed on the day precedent, or subsequent. Before I assign my rea-

sons in support of the opinion above expressed, I will consider the arguments relied on to show that the note was payable on Monday.

It is said that where a person stipulates to do an act on a given day, if the law forbids the performance of it at the time, he may perform it as soon after as is legally possible. This is undoubtedly a true position, if the legal impossibility of strict performance arises posterior to the contract: *Shep. Touch.* 369; *Co. Lit.* 206 a. The question in the case supposed is not, as it is in the one under discussion, what is the construction of the contract? But it is, whether the law does not exempt the party from a strict performance, which it has rendered impossible. It was contended, and with perfect correctness, that if a person agrees to do a lawful act, which circumstances render impossible to perform literally, he must execute his agreement as near to the intent of the condition as he may make it: *Co. Lit.* 219, a, b; *Shep. Touch.* 369. That is, if a natural or legal impossibility prevent the performance according to the letter, he shall execute his contract pursuant to the spirit and intention of it. Nothing can be more equitable. But whether the performance, in the case under discussion, is held to be on Saturday, or on Monday, the nearness of the performance with the time literally prefixed, will be precisely the same. The inapplicability of the rule consists in this, that it has no bearing on the material point of controversy. The question is not whether the defendant shall fulfill his agreement as nearly to the letter of it as he may, and exactly according to its intent and spirit. If it were, the rule laid down would be apposite and in point. But the only inquiry is, what is the legal effect of the note, as to the time of performance—what the construction? Towards this question, the rule commented on has no direction.

It was said, that the Sunday on which the note was made payable must be expunged from calculation. Why not, then, on the same principle, strike out all the Sabbaths included within the sixty days? It requires little discernment to see that the above position proves nothing. It is merely an inference, and takes for granted the point in dispute. If the note, by legal construction, is payable on Saturday, the assertion is out of the question. But if Monday is the day of payment, the day before must be excluded from computation. The question recurs, which of those periods is the correct time of payment? And this is the point which remains to be proved.

Equally unfounded was another assertion, that the promisee

would not expect, or be ready to receive, the article promised, until after the Sunday expressly appointed. This again is an inference founded on a *petitio principii*, a begging of the question in dispute. If the contract fell due on Saturday, by construction of law on the terms of the note, the party promising knew that he must perform it on that day; and the promisee knew that he must be ready to receive the article promised. But if, as the assertion presupposed, the note fell due on Monday, that was the time when the performance would be expected.

It was said, that no person can be compelled to perform his contract previous to the time stipulated. If by this is intended only that the performance of a contract cannot be demanded until the time of payment, according to its general intent and construction, has arrived, it is a mere truism, and not susceptible of dispute. But if the meaning is, that a contract, in the terms of it, payable on Sunday, includes the Monday succeeding before it falls due, it is a proposition I cannot admit, until it is substantiated by proof.

It was contended, that as the order to plead in four days, if the fourth day be on Sunday, includes the following day, so a stipulation to perform an act on Sunday includes the Monday succeeding. This argument is founded on a supposed analogy, and to be of any avail, the analogy must be perfect. The comparison involves a consideration of the words, the subject-matter, the effects and consequences, and the reason and spirit of the subjects compared. I shall not trace the dissimilitude beyond a brief inquiry into the reason of the rule relative to pleading. In *Lord Coningsby's case*, 8 Mod. 21, a rule to plead was made on Thursday, giving the defendant four days. On the following Tuesday the plea was deposited in the proper office. An objection was made that Sunday should be included, and in that court, the plea should have been filed on Monday. But the court said; "These four days must always be reckoned such days wherein the defendant may plead, and when the offices are open; the pleas which are put into the respective offices of the several courts, were originally pleaded in court; and, therefore, Sunday is never reckoned one of these days, because neither courts nor offices are then open," and in *Lee v. Carlton*, 3 T. R. 642, Buller, J. said: "In some instances, when any act is to be done by the party, in a limited number of days, as in the case of a motion in arrest of judgment, the party has four law days, when the court is actually sitting in which to do it; and in those

cases Sunday is not one, though it be an intervening day." But as to the business done out of court, Sundays are reckoned the same as other days: 20 Vin. Abr. 64. The different reasons applicable to the cases supposed analogous, demonstrate that one is no example for the other. These are the principal arguments urged by the counsel for the defendants, and in my opinion, they fall entirely short of the proposition they were adduced to sustain.

I have already observed, that the performance of the contract should be as near to the letter of it as may be; and that it will be equally near, whether the day of payment is considered as being Saturday or Monday. The other branch of my proposition is this: That it must not include a longer period than the one which the contract expressly assumes. In other words, the party promising must perform within the time prefixed. To enlarge the time of a contract, is *jus dicere, non dare* [sic]. If the contractor has appointed a day on which to perform, when, by law, he cannot, he did it with his eyes open, with full knowledge that unless his agreement was void from the impossibility of performance, it could not be executed on the day prefixed. What then is the reasonable consequence? As the party promising knew that his contract could not literally be accomplished, and as he knew likewise that he must perform within the limits of the time assumed, he must have expected and intended to have fulfilled it on Saturday. This, in my judgment, is the fair legal construction. If it wanted fortifying, it would derive it from the well known maxim, a rule of some strictness and rigor, and the last to be resorted to, that the construction is to be most strong against the party promising: 2 Bl. Com. 380.

A person is not always entitled to the full express time stipulated in which to perform his agreement. If there be a contract to tender stock upon a day certain, "tender of transferring may be made at the uttermost convenient time of that day, before the books are shut:" 6 Bac. Abr. 454. And if it were a supposable case, that it was known by a person promising to do an act, that it would be lawful to do it in the former part of the day prefixed, but that all business in the latter part of the day was prohibited, would there exist a doubt that he must perform before the forbidden time rendered it impossible? Should not a person who has promised to pay a sum of money on Sunday, a day on which he knows he cannot perform his contract be considered as stipulating to do it within the time limited, that is, on Saturday?

This question in respect to negotiable notes has long since been answered in the affirmative: 1 Lord Raym. 743; Chitty on Bills, 141. By the custom of merchants, if a bill of exchange including the three days of grace, falls due on Sunday, the holder must demand the money on Saturday; and in case it is not then paid, must consider the bill as immediately dishonored." I consider the three days of grace, which by usage are allowed in addition to the time stipulated in bills of exchange and promissory notes which are negotiable, as if they were expressed on the face of them. They are equivalent to three days superadded to the specified term, and in no respect to be distinguished. The usage of merchants is not, that there shall be three days of grace on bills, but if the last day happens to be on Sunday, there shall be two only; but it is universal, and without exception, that there shall be three days of grace. By construction of this contract among merchants, in analogy to the common law, if the day on which the bill falls due is Sunday, when it can neither be demanded nor paid, it shall be considered as payable on Saturday. The application of the rule to the present case is obvious and forcible. Between a negotiable note becoming due on Sunday, and a note not negotiable payable at the same time, I perceive a distinction, but no essential difference. The construction, in my opinion, should be the same in both instances. It cannot comport with public convenience, that a different rule should prevail in cases so very similar. It is much preferable that there should be one uniform rule on this subject, than that a diversity should exist which will embarrass mankind in their intercourse with each other, and may be a fruitful source of error and litigation.

The argument by a sheriff, when an execution by the terms of it expires on Sunday, that he should be indulged with the day succeeding to make return, would be, in my opinion, as well founded as that of the promisor of a note made payable at the same time. But it is established law, that "if the return day of the writ be on Sunday, and the return appears to be made on that day, it will be bad; nor can it be made on any day subsequent:" 1 Back. Sher. 259.

In fine, in my judgment, one uniform rule of construction on the point under discussion is desirable. The person who promises to do an act, must, at his peril, if there has no impossibility arisen posterior to the engagement perform within the time explicitly assumed. If a contract is stipulated to be performed on Sunday, the legal construction is that it shall be done on

the preceding Saturday. This is agreeable to the usage of merchants in respect of bills of exchange and negotiable notes; an usage not arbitrary and founded on no reason, but bottomed on common sense and common law. And in this opinion I am more deeply confirmed, since no case has been adduced to show that a person has been allowed a period to perform in, beyond the express limitation of his contract.

GOULD, J. Upon the motion for a new trial the question first in order is whether parol evidence was admissible to show what was meant by the words, "wholesale factory prices." These words, I confess, would seem to me *prima facie* to import the actual wholesale market prices at the factory. But if this, or any other similar term, is, by the common consent and general usage of all dealers in a particular branch of business, used in a different sense, and so understood by their customers, there can be no reasonable objection to a party's proving it by parol. It is like the common case of any term of measure, or quantity, used in particular places, or in particular branches of business, in a sense different from the common one; and, like any other latent ambiguity, may be explained by parol evidence. The other question presented under this motion may be more conveniently considered after those which have been raised under the motion in arrest of judgment.

Under the latter motion the first inquiry is, on what day the note was, by the terms of it, payable? And upon this point the question is merely whether the day on which it was executed is to be included or excluded in the computation. This considered as an original question, is a mere question of intention. And therefore, without entering at all into the distinctions discussed in the case of *Pugh v. Leeds*, and other similar cases relating to conveyances, it is sufficient to say that those distinctions have no application to personal contracts, like the present. In such contracts, when payable at a given time from or after date, there can be no doubt that, according to the understanding and intention of the parties (which, if not contrary to the rules of law, certainly ought to govern the construction), the day of the date is to be excluded. And this I take to be the true rule. Otherwise, he who gives an obligation, this day, for the payment of money one day after date, is suable, *instantly*, though the contract imports to be payable in future; and the appointment of a future time of payment is useless and void. In the case of bills of exchange and promissory notes the day of the date is confessedly excluded; and what difference can

there be, in this respect, between a contract for the payment of money and one payable in specific articles?

According to this view of the subject the note in question became payable on Sunday. But payment on that day is prohibited by law. The question then arises whether the tender should have been made on Saturday or Monday. It has been argued that the debtor, in such a case must, at his peril, pay or tender, at all events, within the time appointed. It would seem to me quite as reasonable to say that he cannot in any event be required to pay, nor the creditor to accept payment, before the time appointed. It is true, as to contracts, on which days of grace are allowed, that if the last of those days is Sunday, payment must be made on Saturday. But the allowance of grace was originally a mere indulgence, which it might be very reasonable to qualify with greater strictness than if it had been demandable as a matter of right. At any rate the allowance of grace is an anomaly; and the rules resulting from it are, of course, not to be extended by analogy.

Upon the whole, the doctrine which appears to me most reasonable is, that as Sunday cannot, for the purpose of performing contracts, be regarded as a day in law, it is, as to that purpose, to be considered as stricken from the calendar; though intervening Sundays are doubtless to be counted, as in all other computations of time, because they are not appointed for the performance of any act. And this distinction is analogous to the modes of computation under the common rule for pleading in abatement: 3 T. R. 642. If this view of the question is just, it follows that, in the note on which the present action is brought, the Monday on which the tender was made must be considered as the sixtieth day, and of course the true day of payment.

As to the time of day at which the tender was made, the point upon which it is said the jury were misdirected, I cannot persuade myself that the rule requiring a tender to be made before sunset was ever meant to apply to cases where the creditor is absent through the whole day. The rule was made for his convenience, that he might have a fair opportunity to examine, compute, and take an account of the money or other property tendered. But if he will not appear at all at the place appointed, to avail himself of the benefit of the rule, he waives it; for it can be of no possible advantage to him. While at a distance from the place where the property is he can no more examine it by day-light than in the dark. And his right

and opportunity to make a subsequent examination, is the same in the one case as in the other. I concur in the opinion that neither of the motions can prevail.

TRUMBULL, SMITH, BRAINARD, and GODDARD, JJ., concurred with the chief judge. EDMOND and BALDWIN, JJ., dissented.

Motion in arrest insufficient. New trial not to be granted.

COMPUTATION OF TIME.—There is much conflict among the authorities as to the true method of computing time from a particular day or act, but in the case of notes payable within a certain period "from" or "after" date, the law is undoubtedly settled as stated by Swift, C. J., *supra*, that the day of the date is to be excluded: Edwards on Bills, 514; Story on Promissory Notes; *Bigelow v. Wilson*, 1 Pick. 485; *Ammidown v. Woodman*, 31 Maine, 580; *Roehner v. Knickerbocker Life Ins.*, 63 N. Y. 160. And so, where the words "after date" were not used, but the note was made payable in "sixty days," the day of the date was not reckoned in computing the time: *Henry v. Jones*, 8 Mass. 453; see also *Taylor v. Jacoby*, 2 Penn. St. 498, where the principal case is cited and followed on this point. It is laid down as a general rule upon this subject in many of the cases, following the decision in *Bellasis v. Hester*, 1 Ld. Raym. 280, that where time is reckoned from a given day that day is to be excluded, but where the computation is from an act done, the day in which such act is done is to be included: *Arnold v. United States*, 9 Cranch, 120; *Pearpoint v. Graham*, 4 Wash. C. C. 240; *Batman v. Megowan*, 1 Met. Ky. 547; *Handley v. Cunningham*, 12 Bush. 402. In *Spencer v. Champion*, 13 Conn. 10, the principal case is cited as authority for the position stated in the latter branch of this rule, probably on the strength of what is said by Hosmer, J., quoting from one of the English cases. On the other hand, in *Weeks v. Hull*, 19 Conn. 381, the principal case is referred to as authority for precisely the opposite doctrine, that where time is to be computed from an act done, the day of the performance of the act must not be counted. In a late Massachusetts case, *Bemis v. Leonard*, 118 Mass. 502, Chief Justice Gray reviews the authorities with his usual ability and says: "The rule of construction stated in some of the old authorities, that when time is to be computed from an act done, the day of the act is to be included, has been rejected in the later English cases, of which it is sufficient to refer to *Lester v. Garland*, 15 Ves. 248; and *Webb v. Fairman*, 3 M. & W. 473, where the earlier cases are critically reviewed by Sir William Grant and by Baron Parke." He says further that the rule is now well established in Massachusetts that "in computing time from the date, or from the day of the date, or from a certain act or event, the day of the date is to be excluded, unless a different intention is manifested." The same rule is adopted in *Sheets v. Selden*, 2 Wall. 190; *O'Connor v. Towns*, 1 Texas, 107; and *Goode v. Webb*, 52 Ala. 452. And this is probably the received law in most of the states. The decisions in Kentucky, however, seem still to adhere to the doctrine of *Bellasis v. Hester*, 1 Lord Raym. 280: See *Handley v. Cunningham*, 12 Bush. 402.

LAST DAY FALLING ON SUNDAY.—The rule of the principal case, that where a non-negotiable note falls due on Sunday, it is payable on the day following, is established by the weight of authority, and has been frequently applied, by analogy, to other cases when the day for the performance of a contract or other act happens to be Sunday. *Barrett v. Allen*, 10 Ohio, 426, was a

very similar case to this. The note in that case was payable in woolen cloth at "the fair wholesale factory price," and fell due on Sunday, and the court cited and followed the principal case on every point. In *Salter v. Burt*, 20 Wend. 205, which was the case of a bank check falling due on Sunday, Bronson, J., delivering the opinion of the court, says: "This question was very fully considered in *Avery v. Stewart*, 2 Conn. 69, which was an action on a note not negotiable which fell due on Sunday, and the court held that a tender on Monday was a good bar to the action. I agree to the doctrine laid down by Gould, J., that Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar." So in the case of a note made on Saturday, and payable one day after date, it was held, on the authority of the principal case, to be due on Monday: *Sanders v. Ochiltree*, 5 Porter, 75. The principal case is noticed, and the rule which it lays down on this point is approved in the following decisions: *Lindenmuller v. The People*, 33 Barb. 569; S. C., 21 How. Pr. 156; *Kuntz v. Temple*, 48 Mo. 75; *Thayer v. Fell*, 4 Pick. 354; *Sands v. Lyon*, 18 Conn. 17; *Commonwealth Bank v. Varnum*, 49 N. Y. 279. On the other hand, in *Kilgour v. Miles*, 6 Gill. & J. 268, which was also a case of a non-negotiable note, payable in merchandise and falling due on Sunday, the court say: "We have no statute or Maryland decision to guide us, and in the case in 2 Conn., the only one produced, we find a great diversity of opinion amongst the judges." They therefore refuse to accept the doctrine laid down, and hold that "both analogy and convenience will be consulted" by applying the same rule to such contracts as to notes upon which days of grace are allowed. In *Doremus v. Burton*, 5 Biss. 57, the court refer to the principal case, but seem not to think the doctrine of it applicable to a negotiable note falling due on Sunday, in which days of grace are waived, and that therefore upon such a note demand and protest on Saturday are good to hold the indorsers. To the same effect is *Banker v. Parker*, 6 Pick. 80. It was held also in *Patrick v. Faulke*, 45 Mo. 314, that the principle of *Avery v. Stewart* was not applicable to a mechanic's lien expiring on Sunday, and that such lien must be strictly construed against the lien holder, and hence that it would not continue over to Monday.

USAGE—TENDER.—In *Sturgess v. Buckley*, 32 Conn. 18, the principal case is cited as authority for the doctrine that a usage of trade is binding upon one without actual notice of it. And as to the principle that one who enters into a contract for the delivery of goods on a particular day must tender the articles at such a seasonable hour that the other party will have time to examine them, the case is noticed and approved in *Lyons v. Hill*, 46 N. H. 49; *Croninger v. Crocker*, 62 N. Y. 159.

BUCK v. COTTON.

[2 Conn. 126.]

NOTICE TO ACCOMMODATION INDORSER.—One who indorses a promissory note made by an insolvent person, with full knowledge of the insolvency, merely to give it credit and currency, and without having any interest in it, is nevertheless entitled to notice of non-payment.

ACTION against the defendant as indorser of a promissory note made by one Scovil, dated February 21, 1815, and payable

ninety days after date. At the trial, the plaintiff offered evidence to prove that on May 25, 1815, he demanded payment of the note from the maker, and that on May 24, he gave notice to the defendant that the note was not paid, and that he should look to him for payment. He also offered evidence to prove that at the time of making the note Scovil was insolvent, and had ever since continued so to be, of which the defendant, having full knowledge thereof, indorsed the note without consideration, merely for the purpose of giving it credit and currency. To this evidence the defendant objected, and it was excluded. The court instructed the jury that if they should find that the plaintiff demanded payment on the twenty-fifth of May, and gave the defendant notice of non-payment on the twenty-fourth, their verdict must be for the defendant. Verdict for the defendant, and a motion for a new trial on the ground of misdirection and the improper rejection of evidence, the questions upon which were reserved for the consideration of all the judges.

Russell and Sherman, for the plaintiff, cited *De Berdt v. Atkinson*, 2 H. Bl. 336.

C. Whittlesey, for the defendant, cited *Nicholson v. Gouthit*, 2 H. Bl. 690; *Jackson v. Richards*, 2 Cai. 343; *Pons' Executors v. Kelly*, 2 Hayw. 45 [2 Am. Dec. 617]; *Esdale v. Sowerby*, 11 East, 114; *Smith v. Beckett*, 13 Id. 187; *Sandford v. Dillaway*, 10 Mass. 52 [6 Am. Dec. 99]; *French's Executrix v. The Bank of Columbia*, 4 Cranch, 141.

SWIFT, C. J. No one principle of the common law is better settled than this, that the indorser of a negotiable note must make demand of payment of the maker, when it becomes due, and give immediate notice of non-payment, to entitle him to recover of the indorser. The only contradictory decision is *De Berdt v. Atkinson*, 2 H. Bl. 336, where it is said, that a known insolvency of the maker of the note will excuse demand and notice, but this case has since been overruled in England and in this country, and the contrary doctrine established.

This rule of law is founded in good reason, and results from the nature of the contract. It is the duty of the indorsee to use due diligence to collect the note, he ought to make demand of payment from the maker when it falls due, for otherwise it cannot be known but that it would have been paid. If not paid he ought to give immediate notice to the indorser, to give him an opportunity to withdraw his funds from the hands of the maker, or to pursue his remedy on the note.

It is agreed that, if there be not a known insolvency, at the time of making the note and continuing till it becomes due, demand and notice are necessary, but it does not follow from the insolvency of the maker of the note, that he will not pay it at the time, or that the indorser cannot collect it if he has seasonable notice of the non-payment. The maker of the note may have resources at command, though insolvent, or he may have friends by which he would be able to pay, when demanded, or special circumstances might exist which would induce him to pay the indorser. As, then, insolvency is not conclusive evidence that the note will not be paid, the indorser is entitled to seasonable notice of the non-payment, to enable him to have recourse to his legal remedy.

If the rule is adopted that a known insolvency shall excuse from giving notice, this might lead to disputes, as it would often be a fact difficult to be ascertained, but if notice be required, this could easily be given and easily proved, and frequent litigation might thereby be prevented.

The only case that bears any analogy to this, is that the want of funds in the hands of the drawee of a bill shall excuse from giving notice to the drawer of non-acceptance. But if the drawer has no funds in the hands of the drawee, he can never sustain a loss for want of notice, as he has no funds to withdraw, and can bring no action, it would, therefore, be useless to give him notice. In the case, however, of an indorsed note, the indorser has a remedy on the note, which makes the case entirely different from that of a bill of exchange where the drawer has no funds in the hands of the drawee.

I would not advise a new trial.

In this opinion TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN and GOULD, JJ. concurred.

HOSMER, J. The notice in this case is an entire nullity. It was given the day before the note fell due, and before demand made of the maker, of consequence before there had been any default: *Wiffin v. Roberts*, 1 Esp. 262; *Jackson v. Richards*, 2 Cai. 344; *Jones v. Fales*, 4 Mass. 245.

It is, as a general rule, admitted that after legal demand made on the maker, reasonable notice of non-payment must be given to the indorser. The reason is obvious. The contract of the indorser is not absolute but conditional. It is merely this: "If you use due diligence in demanding the money, and the maker refuses to pay it, and you will give me reasonable notice

of this, I will pay you." If the stipulation requiring notice were utterly useless, it might with propriety be disregarded. But if the maker of the note is insolvent, this cannot with truth be asserted. It would be in opposition to known possibilities and repeated decisions. "It is no excuse," said Lord Mansfield, "for not demanding payment on a note or bill, or giving notice, that the maker or acceptor has become bankrupt, as many ways may remain of obtaining payment by the assistance of friends, or otherwise:" Doug. 515; 1 T. R. 408; 2 H. Bl. 612; 11 East, 117. "The insolvency of the maker renders the indorser's remedy less valuable; it does not necessarily render it worthless:" *Sandford v. Dillaway*, 10 Mass. 54 [6 Am. Dec. 99].

It was contended in the argument, that as Scovil was a known insolvent, and the defendant indorsed his note merely to give it credit and currency, the indorser must be considered as having waived notice, and become co-debtor with him. This conclusion is most unwarrantable. If the defendant had intended to become absolutely bound, he would have given a note with Scovil, or in some explicit shape, would have assumed the payment of the debt. But an indorsement of a note does not import an absolute engagement. It is a collateral contract and conditional agreement; from its nature and frequency perfectly intelligible, and always implying the same obligation. There is nothing in the form of the indorsement, nothing in the established usage of merchants, nothing in the demands of justice, which distinguishes the case under discussion from ordinary cases. The defendant appears in the well known character of an indorser, and in that character he must be treated, or the court cannot escape the imputation of making, instead of construing, the contract.

It has been urged that this case is analogous to those where the drawer of a bill has no effects in the hands of his drawee. In those cases he is not entitled to notice. I answer that there is no analogy. His drawing the bill is a fraud; he knows it will be dishonored; and in the last resort, he is answerable, without the possibility of recourse to any other person: 1 T. R. 405; 2 Id. 713. But in relation to an indorser for the accommodation of another, the very reverse is true. He has committed no fraud; he cannot know that the maker of the note will not pay it; and he has a deep interest in notice of non-payment, that he may call on him for satisfaction or security.

It is highly to be desired that there should be a certain rule in these cases, which, in the event of the most hopeless bank-

ruptcy, may be productive of benefit. But to render notice unnecessary in the event of insolvency, is opening a door to expensive litigation and much possible injustice. Even in the instance of bills drawn on one who has no funds of the drawer in his hands, it has been the subject of regret "that the old rule requiring notice to be given, in all cases, to the drawer of the non-acceptance of his bill, was so far broken in upon." "But," says Lord Ellenborough, "I shall anxiously resist the further extension of the exemption:" 7 East, 362.

There has been some inconsistency of decision concerning the liability of an indorser under the facts of this case, but the law is now well established. In the year 1794, a case occurred in the English court of common pleas, precisely like the one under discussion. The court adjudged, that "the defendant meant to guarantee the payment of the note" absolutely: *De Berdt v. Atkinson*, 2 H. Bl. 336. In the succeeding year, Buller, J., one of the judges of the above-mentioned court, again expressed the same opinion: *Corney v. Da Costa*, 1 Esp. 302. But in the year next succeeding, the same court of common pleas reversed their former decision; and on this subject the English courts have made no subsequent determination: *Nicholson v. Goulthit*, 2 H. Bl. 609. "The difficulty," said the lord chief justice, "arises from the mode which the parties have chosen in which the guaranty shall take place, by the indorsement of a note." The question then, is, whether, when the guaranty is taken in that shape, all the legal consequences do not follow, so as to limit its generality. Upon consideration I cannot say that they do not follow; and they require a demand on the maker, and notice to the indorser, within a reasonable time.

In the states of New York, Massachusetts and North Carolina, the same question has been decided in a similar manner: *Jackson v. Richards*, 2 Cai. 343; *Sandford v. Dillaway*, 10 Mass. 52 [6 Am. Dec. 99]; *Pons' Executors v. Kelly*, 2 Hayw. 45 [2 Am. Dec. 617]. In the case of *Jackson v. Richards*, Kent, C. J., said: "When a person signs a note in the character of indorser, the presumption is, that he is to receive all the privileges of that character." And in the case determined in Massachusetts, the court observes: "The indorser of a promissory note contracts that he will pay the contents, provided the maker does not pay it, when regularly demanded of him, and seasonable notice of his refusal or neglect to the indorser. This demand and notice he has a right to insist upon, for this reason: That upon payment by him he may have his remedy

over against the maker. And, although the insolvency of the maker renders his remedy less valuable, it does not necessarily render it entirely worthless." I entirely concur in the reasons assigned in both cases.

New trial not to be granted.

Upon the point that the insolvency of the maker of a note furnishes no presumption that he may not be able, in some way, to pay or to furnish security to the indorser, when the note matures, the principal case is cited in *Broome v. Beers*, 6 Conn. 210. In *Holland v. Turner*, 10 Id. 308, it is referred to and relied upon as authority, for the position that an accommodation indorser, who has taken security from the maker of a note, is entitled to notice of non-payment, notwithstanding the fact of the maker's insolvency, of which the indorser has no knowledge.

See *Barton v. Baker*, *post*.

LLOYD v. KEACH.

[2 Conn. 175.]

SALE OF NOTE—USURY.—The sale of a promissory note, with the seller's indorsement, at a discount exceeding the lawful rate of interest is not usurious if made *bona fide*, and not as a cover for a loan.

SAME—BURDEN OF PROOF.—Such sale being *prima facie* valid, the burden of proof rests upon the party who claims that it was usurious.

USURIOUS INDORSEMENT—DEFENSE BY MAKER.—The maker of a promissory note, valid in its inception, which has been indorsed for a usurious consideration, may take advantage of the usury in an action by the indorsee.

ACTION by the indorser against the maker of a promissory note. The facts were: The note in question was given by the defendant in the course of business to one Samuel Pettes, and made payable at the Hartford bank. Pettes subsequently sold and indorsed the note to the plaintiff, at a discount exceeding six per cent. per annum, which was the lawful rate of interest. The evidence on the part of the plaintiff tended to show that the transaction was a *bona fide* sale of the note upon good consideration, and that the maker was at the time in failing circumstances. The court instructed the jury that if they should find that Pettes transferred the note to the plaintiff at a discount greater than the lawful interest, and indorsed it in such a manner as to become responsible to the plaintiff for the full amount of it, the transfer was usurious and their verdict must be for the defendant. There was a verdict for the defendant and a motion for a new trial on the ground of misdirection, upon which the question was reserved for the consideration of all the judges.

Condee, for the plaintiff, contended: 1. That there was no usury in the transaction, as it was a sale and not a loan of money, either in form or substance, citing *Musgrove v. Gibbs*, 1 Dall. 217; *Kenner v. Hord*, 2 Hen. & Mun. 14; and, 2. That even if the indorsement was usurious, the maker could not take advantage of it, since there was no usury in his agreement, citing *Bush v. Livingston*, 2 Cai. Co. 66 [2 Am. Dec. 316]; *Littel v. Hord*, Hardin, 81.

T. S. Williams and W. W. Ellsworth, for the defendant, cited: 1. As to the question of usury, *Rich v. Topping*, 1 Esp. 176; *Brard v. Ackerman*, 5 Id. 119; *Jones v. Brooke*, 4 Taun. 464; *Churchill v. Suter*, 4 Mass. 156; Lord Kenyon's opinion in *Daniel v. Cartony*, 1 Esp. 274; *Folls v. Mey*, 1 Bay. 479; and, 2. As to the defendant's right to make this defense, *Strong v. Tompkins*, 8 Johns. 98, as an analogous case.

SWIFT, C. J. The question presented by this motion is, whether the sale of a promissory note, at a discount exceeding the lawful rate of interest, accompanied with the indorsement of the seller, with a warranty of the ability of the maker to pay it, is, in all cases, usurious.

It has been said that the charge was made with reference to the particular circumstances of the case, and if not correct as a general proposition, it would be correct as applicable to this case. But the circumstances are not detailed in the motion. It appears that the plaintiff claimed to be a purchaser of the note. No facts are disclosed to show it was a pretended sale, and in substance a loan. It merely appears that the note was indorsed and warranted; and the court explicitly say, that the sale of a note at a greater discount than six per cent. per annum, indorsed with warranty, is usurious; and direct the jury, if they find the note was thus transferred, they must bring in their verdict for the defendant. This is laying down the proposition in the broadest terms; and it is not applicable to the special circumstances of a particular case. The real question then, is, whether the sale of a note at such discount, with warranty, is in all cases usurious. If a case can be stated in which such sale would not be usurious, then the charge was incorrect.

These principles will not be denied: that to constitute usury, there must be a loan, directly or indirectly; that a real sale, without any intent to loan, though it may be oppressive, cannot be usurious; that promissory notes are as much the subject of sale as any other property; that they may be sold at any dis-

count; and that they may be sold either with or without warranty. Having premised these remarks, the question is to be considered, whether a note cannot be sold at a greater discount than six per cent. per annum, and warranted without being usurious.

Such a man should offer a note for sale, against another in Georgia, of large property. Though it might be certain that it would be paid when presented, yet the expense of sending for, and the hazard of remitting, the money, would render it of less value than cash. The sale of a note, under such circumstances, though warranted, would not be usurious. This principle may be illustrated by the case of bank bills. During the late war, the bills of banks who refused to pay specie, though there was no doubt of their ability, passed at a discount. So the bills of distant banks, though of undoubted credit, commonly pass at a discount; and yet it never was pretended that this was usury. It is true the cases are not precisely similar, as it is not the practice to indorse and warrant bank bills. But suppose the seller should indorse and warrant a bill against a bank, which met all their demands with punctuality, will it be seriously pretended that this will make the transaction usurious? And yet on the principle contended for, in this case, such would be the effect of warranting a bank bill, where it passed at an extra discount. Indeed, it is evident that there may be many cases where there is good reason for selling a warranted note at an extra discount. Of course, a mere warranty cannot, in all cases, convert a sale into a loan and make it usury.

But the argument relied on is, that the indorsing and warranting a note, is drawing a bill of exchange; and that the drawing a bill of exchange for more than is received would be usurious. There is no question but that the indorsing and warranting a note is like drawing a bill, as it respects the obligations and liabilities created by it. But to make the analogy complete, we must consider it to be the sale of a bill of exchange at an extra discount; for if the indorsing and warranting a note is drawing a bill, then selling a note so indorsed and warranted is selling a bill; and the question then will be, whether a bill can be sold at an extra discount, without being usurious. The argument takes it for granted that the disposing, in any shape, of a bill of exchange, at an extra discount, is usurious; but this is begging the question. It is manifest that no article is more properly the subject of sale than a bill of exchange; that the price depends on the demand, as well as

various other circumstances, like any other property; and is sometimes above, and sometimes below, par. Of course, the fair sale of a bill, in the regular course of business, at any discount, is not usurious.

This, as it respects foreign bills, is not questioned. But it is insisted that there is a difference between foreign and inland bills, owing to the different circumstances under which they are negotiated. There is, however, no ground for such distinction. Where there are reasons to justify it, an inland bill may be sold at an extra discount as well as a foreign; and in many cases the same reasons for such discount may exist in both kinds of bills. Their value will be determined by the rate of exchange between the places where drawn, and on which they are drawn, and the expense, difficulty and delay of negotiation.

It is true, discounting bills of exchange may be made an instrument to practice usury; but where this is a shift to evade the statute, it will be usury. So that the inquiry will be, whether it was a real sale in the regular course of business, or a colorable sale, with intent to disguise a loan and evade the statute against usury.

It has been said that the sale of a warranted note, at an extra discount is *prima facie* evidence of usury; and that it behooves the party claiming by it, to show the circumstances which take it out of the statute. But such sale cannot be *prima facie* evidence of usury; for it is valid unless it be a loan in disguise; of course the burden of proof lies on the party claiming it to be usury; and it is necessary for him to show the circumstance which bring it within the statute.

Much reliance has been placed upon the case of *Churchill v. Suter*, 4 Mass. 156. That was a note made to raise money; it was indorsed and delivered to a broker to negotiate in the market, who indorsed and sold it. Chief Justice Parsons says: "A note may be sold at a greater discount than the legal interest without being usurious. This usually happens when the holder doubts the solidity of the persons holden to pay, and therefore sells it without his own guaranty, at a greater than the legal discount, on account of the hazard." But in that case he remarks, the purchaser "took the guaranty of all persons, who ever had any interest in the note, and even of the broker." He therefore considers the transaction to be usurious. The only point to be settled by this case, is, that the warranty of a note proves it was not sold at an extra discount, by reason of the doubtful credit of the maker. This is true, and if there could

be no other reason for selling a note at an extra discount it would show the charge to the jury, in this case, to be right. But it is unquestionably true, that other good reasons may exist for selling a note at an extra discount; such is the case of the sale of a note against a man in Georgia, before mentioned. Of course, the case of *Churchill v. Suter*, does not prove the proposition that the sale of a warranted note at an extra discount, is, in all cases, 'usurious.

I apprehend, that the correct principle is, that a note may be sold at any discount; but though there be a sale in point of form, yet if it is merely colorable, to evade the statute, and the transaction is in substance a loan, then it will be usurious. The warranty will be an item of an evidence to ascertain the nature of the transaction; it will prove that the discount could not have been made on account of the doubtful circumstances of the maker of the note; but it cannot be, in all cases, evidence, of itself, of usury.

A question has been made by the plaintiff, whether, admitting the indorsement to be usurious, the defendant can take advantage of it. On this point there can be no doubt. The indorsee of a note must show a legal right; that he came lawfully by the possession of it; to entitle him to recover. Of course, it is competent for the defendant to show that he had no legal right, or that the possession was not lawful.

I think a new trial ought to be granted.

HOSMER, J. The note in question was given for a fair consideration to Pettes, who indorsed and delivered it, on a discount exceeding the lawful interest, to the plaintiff. The parties to the note resided within a few miles of each other. This is the whole case.

The court charged the jury, that the question was, whether the transfer by Pettes was a *bona fide* sale to the plaintiff. They instructed them, that if a man borrow money, and give a note for more than six per cent., it is usurious; and that if a note is sold for a sum less than its nominal amount, and the holder and seller should indorse it by way of guaranty, to the lender or purchaser, this would be usury. By way of applying the above principles, they, in the final result, directed the jury, that if Pettes indorsed the note so as to become responsible for the amount of it, their verdict must be for the defendant.

The charge rests on this basis, that a note given by a person for money borrowed, comprising, as a compensation for the loan, more than the legal allowance, is usurious; and that a

note indorsed in the common form falls within the same rule. It is difficult, and in my judgment impossible, to resist the conclusive force of this proposition. It cannot be controverted that a note intentionally given for a sum of money, with interest at more than six per cent., is usurious *per se*. No person will suppose that there is any difference between such a promissory note and a bill of exchange on which there has been a similar reservation. They are equally illegal and equally opposed to the statute of usury. Now, a promissory note, when indorsed is, to every legal intent, a bill of exchange. "While it continues in its original shape it has no similitude to a bill of exchange. When it is indorsed, the resemblance begins; for then it is an order by the indorser upon the maker to pay the indorsee. The indorser is the drawer; the maker is the acceptor; and the indorsee, the person to whom it was made payable:" *Heylyn v. Adamson*, 2 Burr. 676. Apply it to the principal case. Pettes draws a bill of exchange on Keach, in favor of the plaintiff, which bill was accepted by Keach, and the consideration of it was a discount from the nominal sum of twelve per cent. Who doubts the usury contained in this transaction?

The principle established in *Heylyn v. Adamson* has been repeatedly and uniformly recognized. An indorsee may declare against his immediate indorser, as on a bill of exchange made by him, and payable to the plaintiff; the act of indorsing being similar, in its operation, to that of making a bill. The reason is assigned by Holroyd in the 4th of Term Reports: that, "independently of the statute of Anne, the indorsement of a promissory note, of itself, constitutes a bill of exchange as falling within the same definition, namely, a request by one to another to pay a third person:" *Brown v. Harraden*, 4 T. R. 149; see Chitty on Bills, 99, Lond. ed. No particular form of words is necessary to constitute a bill of exchange; "a request to deliver money to another is sufficient:" *Morris v. Lee*, 2 Ld. Raym. 1397. The indorser of a bill may charge himself with terms different from the tenor of the bill, for he is a new drawer: *Gould's Esp.*, vol 1, pt. 1, 88, 95; *Bomley v. Frasier*, 1 Str. 441; *Lake v. Hayes*, 1 Atk. 281; *Heylyn v. Adamson*, 2 Burr. 669; *Lambert v. Pack*, 1 Salk. 127.

I do not entertain a doubt that a bill or note may be sold at a discount, without incurring the charge of usury. Of a *bona fide* sale they are as susceptible as personal property in possession is: *Musgrove v. Gibbs*, 1 Dall. 216; *Wycoff v. Longhead*, 2 Dall. 92. A sale is the transmutation of property, with or with-

out a warranty of title. But the indorsement of a promissory note, or bill of exchange, is a transfer, accompanied with a contract collateral to the sale, and is more than the mere transmutation of property with warranty of title. On this principle a direct opinion has been given by Parsons, C. J.: "A note," says he, "may be sold at a greater discount than the legal interest without being usurious. This generally happens when the holder doubts the solidity of the parties holden to pay, and therefore sells it without his own guaranty, at a greater than the legal discount, on account of the hazard. In the case before the court, the plaintiff took the guaranty of all persons who ever had any interest, and even of the broker. If a sale, under these circumstances, is not to be considered as usurious, it is not easy to conceive what sale is within the state." *Churchill v. Suter*, 4 Mass. 162. The statute of usury, if a note like the one under discussion may legally be indorsed, on the pretext of a sale, is a dead letter. A decision sanctioning such a transaction effectually repeals the law.

I do not find it pointedly decided that a note indorsed and negotiated at an extra discount, necessarily contravenes the statute of usury. I presume it is because the truth of the position has never been doubted. It has been taken for granted in numerous instances: *Pratt v. Willey*, 1 Esp. 40; *Daniel v. Cartony*, 1 Id. 274; *Brard v. Ackerman*, 5 Id. 119.

It was supposed in the argument of this case that a determination against the plaintiff would be unfriendly to the sale of foreign bills of exchange. I am not of that opinion. Among merchants there is a common usage to sell indorsed bills of this description. If the transfer is according to the usual rate of exchange, and not a cover for usury, it is free from exception. The case is peculiar. "The price of exchange arises from this circumstance: that in commercial places a bill drawn upon a particular place is sometimes more valuable than money; and on the contrary, money is sometimes more valuable than such a bill. This difference depends upon the abundance or scarcity of the money which is to be drawn for or remitted." *Evans on Bills of Exchange*, 40.

A contract could never be considered as corrupt, where the indorser obtained no more for his bill than the marketable cash value, or the worth of it to the indorsee, by the well known standard of exchange. But the domestic transaction under discussion between the parties bounded by the circumference of half a dozen miles, renders a further discussion of this subject wholly inapposite.

The court, in the charge given to the jury, obviously confined themselves strictly to the case before them. They expressed their opinion and direction upon the operation of law on the facts appearing. It would have been both improper and unnecessary for them to have gone beyond the case. The direction to the jury, in my judgment, was adapted to the facts, and is precisely correct.

If the principles I have assumed and their application to the case are admitted, the only conceivable objection to the court's charge must arise from the direction given to the jury. It has been contended that they should have been instructed to view the inquiry, whether the statute was contravened as mere fact. I cannot assent to this position. The facts having been proved or admitted, whether the case is within the statute is merely a question of law. It is perfectly analogous with the case put by the court in their charge. If a man borrow money, and give a note for more than six per cent., it is usurious. The usury in the proportion advanced results necessarily. There is nothing to leave to the jury. Between this and the principal case I can discern no material difference.

To the objection made that no person may take advantage of usury in the indorsement of a note, but the person oppressed with the unlawful exaction, I reply that the assertion is utterly unfounded. The plaintiff can recover only on the exhibition of a legal title, and the defendant may avail himself of the want of it: *Strong v. Tompkins*, 8 Johns. 98. The contract, if usurious, is void; and the title being directly in issue, the defendant may protect himself by showing its validity. The point has often been settled, and is at rest: *Pratt v. Willey*, 1 Esp. 40; *Rich v. Topping*, Id. 176; *Daniel v. Cartony*, Id. 274; *Coombe v. Miles*, 2 Camp. 553. In the cases cited, and many more that might be mentioned, to the usury complained of, the defendant was no party.

EDMOND, BRAINARD, SMITH and GODDARD, JJ., concurred with the chief justice. THUMBULL, BALDWIN, and GOULD, JJ., dissented.

New trial to be granted.

The rule here laid down, that a sale of a valid note with the seller's indorsement is not usurious unless the transaction is intended as a cover for a loan, is noticed and approved in *Belden v. Lamb*, 17 Conn. 441; *Freeman v. Brittin*, 2 Harr. N. J. 191; *Cram v. Hendricks*, 7 Wend. 569; *Nichols v. Frearson*, 7 Pet. 103; *Dickerman v. Day*, 31 Iowa, 444; S. C., 7 Am. Rep.

156. The last-mentioned case presents a very full array of the authorities on this point. See the note to *Wilkie v. Roosevelt*, 2 Am. Dec. 155. See also the note to *Bearce v. Barstow*, 6 Am. Dec. 25, upon the question as to the necessity of an intent to evade the statute against usury in order to make the transaction usurious. Upon the question of the right of the maker of a valid note to resist payment of it on account of a subsequent usurious indorsement, the authority of the principal case is denied in *Knights v. Putnam*, 3 Pick. 184, where the subject is fully discussed, and it is decided that in an action by the indorser against the maker, usury between the indorsee and indorser cannot be set up in defense. Indeed it seems to be settled, in most of the states, that the defense of usury is personal to the party against whom it is committed, and that a stranger to the usurious transaction cannot take advantage of it: *Conwell v. Pumphrey*, 9 Ind. 135; *Fenno v. Sayre*, 3 Ala. 458; *Cain v. Gimon*, 36 Ala. 168; *Loomis v. Eaton*, 32 Conn. 550; *Safford v. Vail*, 22 Ill. 327; *Cutchen v. Coleman*, 3 Ind. 568; *Farmers' Bank v. Kimmel*, 1 Mich. 84; *Clapp v. Hanson*, 15 Maine, 345; *Ransom v. Hays*, 39 Mo. 445; *Cowles v. McVickar*, 3 Wisc. 725; *Armstrong v. Gibson*, 31 Id. 61. In several of these cases, and particularly in the last two mentioned, it is expressly decided, upon a review of the authorities, that a usurious indorsement passes a valid title to the note as against the maker.

WHEELER v. WALKER.

[2 Conn. 196.]

CONDITIONAL DEVISE.—A devise of an estate to the sons of the testator, "they jointly and severally paying" to his daughters a certain sum within a specified time, is strictly conditional upon the payment of the money within the time limited.

EXECUTMENT for an undivided fourth part of a certain tract of land. The facts were: Eliakim Walker, being seised of the demanded premises, died in December, 1812, having made a will on the twelfth of June preceding, which contained the following clause: "As to the rest and residue of my estate, both real and personal, together with my wearing apparel, I give and bequeath the same to my two sons, David and Nathan Nichols, to be equally divided between them, they jointly and severally paying to my two daughters, Patience Wheeler and Ann Wheeler, the sum of three hundred dollars each, within one year after my decease." Within three months after the death of the testator, Nathan Nichols also died. Immediately after the distribution of the testator's estate, David Walker, the defendant, entered upon the demanded premises, claiming title under the will, and has ever since remained in possession. There was never any payment or offer of payment of the money mentioned in the will to Patience or Ann Wheeler, by either of the devisees, until six weeks after the expiration of one year

from the testator's death, when the defendant tendered the sum of three hundred dollars to Patience Wheeler, which she accepted. On the same day, the defendant tendered a like sum, with the interest due thereon, to the plaintiff, the husband of Ann Wheeler, but he refused to receive it. On the twenty-second of December, 1815, the plaintiff, in behalf of himself and wife, entered on the demanded premises, alleging that the condition of the devise was broken, and claiming one fourth part of said premises for his wife as heir at law. The plaintiffs were soon after disseised by the defendant, and have been ever since held out by him. By consent, the case was reserved for the consideration of all the judges.

Sherman and Staples, for the plaintiffs, contended that this was a conditional devise, and that the defendant having failed to comply with the condition, within the time, the heirs at law had a good right to enter, citing *Wellock v. Hammond*, Cro. Eliz. 204; *Crickmere v. Paterson*, Id. 146; S. O. 1 Leon, 174, cited Co. Litt. 236 b; *Fox v. Carlyne*, Cro. Eliz. 454; *Boraston's Case*, 3 Co. 21 a; and as to whether words in a will are to be construed a condition or a limitation, they cited 10 Co. 41 a; *Powell on Devises*, 262 *et seq.*; *Fearne on Remainders*, 272, 6 ed.; 5 Bac. Abr. 803 Wils. ed.; 1 Ves. 422; Cowp. 841; *Grimstone v. Bruce*, 2 Vern. 594.

Daggett and N. Smith, for defendant, insisted, 1. That the will in question created neither a condition nor a limitation, but that this was a devise in trust, citing 8 Vin. Abr. 336, pl. 4; *Sadd v. Carter*, Prec. Chan. 28; *Alcock v. Sparhawk*, 2 Vern. 228; *Miles v. Leigh*, 8 Vin. Abr. 347, in marg.; Com. Dig. tit. Chancery, Breach of Condition, Q. 2; and, 2. That, admitting a condition, as there was no demand of payment, there was no breach, citing *Robinson v. Holmes*, cited in *Joliff v. Crew*, Prec. Chan. 161.

SWIFT, C. J. The question is, whether this is an absolute devise of the lands to the sons, and a legacy to each of the daughters, or whether it is a devise on condition that the sons pay to each of the daughters three hundred dollars. The word "paying," according to all the authorities, clearly imports a condition. There is no gift or legacy to the daughters. No right is created in their favor, by the will, nor are any words used which can be construed to imply such intent. It is, then, a conditional devise. The deviser has given the land to his sons, on condition that they pay three hundred dollars to each of his daughters within one year after his decease. To entitle

them to the land, they are bound literally to perform the condition on which it was given, and pay the money by the time prescribed. Having failed to do this they have no right to the land under the devise. It reverts to the heirs of the devisor. The plaintiffs had right to enter, and are entitled to recover.

There is no ambiguity in the language of the will, and whatever we may conjecture, respecting the intent of the testator, we are not at liberty to presume one contrary to the legal effect of the words he has used.

HOSMER, J. It is difficult to conceive a case more free from controversy than this, whether we regard the manifest intention of the testator, or the uniformity of the precedents.

The devisor, after having made certain devises, gives to his sons, David and Nathan, "all the rest and residue of his estate real and personal, they paying to his two daughters, Patience Wheeler and Ann Wheeler, each three hundred dollars, within one year after his decease." The money was not paid. The plaintiffs enter for non-payment, and bring ejectment to recover the possession.

It was argued for the defendant, that the sum bequeathed was a mere legacy, or trust, to be enforced in chancery only. To this the reply made is conclusive, that it is more than a legacy or trust, it is a devise on condition, by the non-performance of which the plaintiff Ann, one of the heirs of the devisor, has right of entry on the land devised. An estate on condition expressed in the grant or devise itself, is, where the estate granted has a qualification annexed, whereby the estate shall commence, be enlarged, or defeated, upon performance or breach of such qualification or condition: 2 Bl. Com. 154; Co. Litt. 201. Estates on condition subsequent are defeasible, if the condition be not strictly performed: 2 Bl. Com. 154.

The words which constitute a condition, may be various. "In particular words there is no magic;" their operation depends on the sense which they carry: 1 Ves. 147. What, in this case, was the intention of the devisor, is the decisive question. Was it his purpose to invest his sons with an estate defeasible on a condition, which would effectually coerce the payment of the money bequeathed to his daughters; or did he intend to leave them destitute of legal remedy to vindicate their undoubted rights. A construction of the devise, according to the usual signification of language, and duly regarding the subject-matter, and the consequences, will leave no doubt on the mind.

Land granted to a person on condition, or, provided always,

or, if it shall so happen, or, so that he pay to another a specific sum, within a specified time, vests in him a conditional estate; and if he does not punctually make payment of the money, his estate has become voidable by entry: Co. Litt. 203 a. From the case of *Crickmere v. Paterson*, adjudged in the thirtieth of Elizabeth, Co. Litt. 206 b; Cro. Eliz. 146, it appears that the words, "to pay," in a will have been considered as constituting a condition. That case was this: A man seised of certain lands, holden in socage, had issue, two daughters, A. and B., and devised all his lands to A. and her heirs, to pay unto B. a certain sum of money, at a certain day and place. The money was not paid; and it was adjudged that these words, "to pay," etc., did amount in a will to a condition; and the reason was for that the land was devised to A. for that purpose; otherwise B., to whom the money was appointed to be paid, would be remediless; and the lessee of B. upon an actual ejectment recovered the moiety of the land against A. The words "to pay," in the preceding case, are precisely equivalent to the word "paying," in the one before the court. In *Boraston's case*, 3 Co. 21; *Mary Portington's case*, 10 Co. 41; *Wellock v. Hammond*, Cro. Eliz. 204, and *Fox v. Carlyne*, Cro. Eliz. 454, the word "paying" in a will was considered as creating a condition, or limitation, as should best effectuate the intent of the testator. In the case of *Crickmere v. Paterson*, the words "to pay," etc., was decided to import a condition, and this construction gave a sufficient remedy. But in *Wellock v. Hammond*, the expression, "paying forty shillings to each of his brothers and sisters," was adjudged a limitation; for if it were considered a condition, there was in that case no remedy for the money. And in *Mary Portington's case*, it is said, "this word, 'paying,' shall amount to a limitation in a will by construction, because in law it is not any word, either of condition or limitation; and therefore in a will it shall serve as well for the one as for the other, to supply the intent of the devisor."

The meaning of the expression in *Crickmere's case*, "otherwise B., to whom the money was appointed to be paid, would be remediless," has been quite misconceived. The idea communicated undoubtedly is this, that under the devise there was no other legal remedy. It is of no avail, in this construction of the devise, that chancery may give redress, or that the devisee has engaged to make payment. The court neither refer to the remedy which a court of equity may impart, nor to any future possibilities; for the exposition given, it is a sufficient

reason that the law gave no other redress by virtue of the devise, for the coercion of payment, than by construing the words to import a condition. This effectuated the intent of the testator. The same observations are equally applicable to the case before the court. To expound the devise as bequeathing a legacy, or subjecting the devisees to a trust, deprives the daughters of all redress at law; and this is a decisive reason for considering the words as importing a condition.

To enter at greater length into a consideration of the question whether the devise creates a condition or limitation can be of no importance. On either exposition, the remedy of the plaintiffs is the same. It is, however, very apparent that to consider the words as importing a condition is all that is requisite to secure the rights of the plaintiffs under the devise; and this decisively settles the construction.

The other judges were of the same opinion, except Gould, J., who had been of counsel in the cause.

Judgment to be given for the plaintiffs.

In *Judd v. Bushnell*, 7 Conn. 204, the language of Hosmer, J., as to what words in a devise may import a condition is quoted with approval, and the rule of construction here adopted was followed. In *Lloyd v. Holly*, 8 Conn. 490, the principle of this case was applied to an assignment in which certain goods were assigned to one, he "paying" certain sums to a third person, and it was held that such assignment was conditional upon such payment. The court also applied the same principle in *Seymour v. Harvey*, 11 Conn. 275, in the construction of a writing given by a creditor to a gaoler permitting his debtor to be removed from the gaol limits on account of sickness, the gaoler "being answerable for his return," and it was held that the language imported a condition according to which if the gaoler suffered the departure of the debtor he was to become responsible for his return.

STARR v. LEAVITT.

[2 Conn. 243.]

EXECUTION AGAINST TENANT IN COMMON.—An execution against one tenant in common cannot be levied by metes and bounds on a part of the land held in common, but must be extended over the whole tract, and such undivided proportion taken as will satisfy the debt.

SAME—LEVY UPON DISTINCT TRACTS.—When a debtor holds as tenant in common in two distinct tracts, by different titles, his creditor cannot spread his execution over both tracts and take a part of the debtor's interest in each, but must take his whole interest in one before resorting to the other.

EJECTMENT to recover an undivided part of two tracts of land. The plaintiff claimed title under an execution in his favor

against one Simeon Mitchell, who was tenant in common with his brother David of an undivided moiety in each of the tracts in question, and upon the death of his brother, became entitled as heir to one seventh of the other moiety, the said tracts being entirely distinct and held by different titles. The execution was levied upon both tracts, and an undivided interest in a moiety in each (subject to the right of dower of David Mitchell's widow in one of the tracts), was set off to the plaintiff, so that his interest was in such proportion to the whole as his debt bore to the entire appraised value of both tracts, subject to said right of dower. The defendant claimed title under two executions in his favor against the said Simeon Mitchell, which were issued and levied before that of the plaintiff. One of the defendant's executions was levied on the one equal undivided half of one of the tracts in question, which was appraised and set off to him in full satisfaction of said execution. The other execution was levied on the undivided half of a part of the other tract, designated by metes and bounds, which was appraised and set off to the defendant in satisfaction of said execution.

The case was reserved, by consent, for the consideration of all the judges.

Chapman and Sherman, for the plaintiff, contended, 1. That the defendant gained no title because he took only a part of the land held in common by metes and bounds, and because he took only a half interest in the part taken, whereas the debtor's interest was seven twelfths, citing *Hinman v. Leavenworth*, in this court, June term, 1813, and *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22], and, 2. That the plaintiff acquired a valid title because he took an undivided portion of the whole.

Benedict and Bacon, for the defendant, insisted, 1. That the defendant's levy by metes and bounds was correct, likening it to the case of an *elegit* in England, and citing *Pullen v. Birkbeak*, Carth. 453; *Stamford v. Nedham*, 1 Lev. 160; *Anon*, 1 Vent. 259; *Sparrow v. Mattersock*, Cro. Car. 319; *Dew v. Abingdon*, Doug. 475; and, 2. That if defendant's levy was incorrect in not taking all the debtor's interest, the plaintiff's levy was subject to the same infirmity, and therefore he could not recover.

SWIFT, C. J. The plaintiff and defendant both claim the land demanded by the levy of executions upon it, as the estate of Simeon Mitchell, and questions arise respecting their validity.

The defendant has levied upon part of a piece of land, which Simeon owned as tenant in common with the heirs of David

Mitchell. The same has been set off to him by metes and bounds; and he has taken the undivided moiety or right of Simeon to the part of the tract so described. This levy is void, according to the principles adopted by this court in the case of *Hinman v. Leavenworth*. Simeon had no such estate as an undivided moiety or share in a part of the tract he owned as tenant in common; he had an undivided share in the whole tract; and the proper mode of levying the execution would have been to spread it over the whole tract holden by Simeon as tenant in common, and to take such an undivided proportion as would satisfy his debt. If the debt had been sufficient to take the whole share of Simeon, then the levying creditor would have been tenant in common with his co-tenant; if not, then he would have been tenant in common with the others in unequal shares, and a partition of the whole would have been made. But upon the present levy, partition must be made of part of the common right of Simeon with the other tenants, which can not by law be done.

The plaintiff adopted the proper mode of levying his execution, but he has spread it over two distinct tracts of land holden by Simeon, as tenant in common with the heirs of David, by distinct titles, and has taken an undivided share of Simeon in both pieces; but has not taken the whole of Simeon's right in either piece. He should have taken the whole of Simeon's right in the tract on which he first levied, and then, if that had been insufficient to satisfy his execution, he might have levied on the other tract, and have taken sufficient to pay his debt. If the mode adopted by the plaintiff should be sanctioned, it would be in the power of a creditor to levy an execution upon any number of tracts of land holden by a debtor as tenant in common, by distinct titles, and with different co-tenants, and take an undivided share of each, so as to become tenant in common with them all. This would be productive of great and unnecessary expense, and might embarrass the title as well as the occupation of the lands, and ought not to be permitted.

I am of opinion that the plaintiff is not entitled to recover.

In this opinion the other judges severally concurred, except EDMOND and GOULD, JJ., who gave no opinion; the former being related to one of the parties, and the latter having been of counsel in the cause.

Judgment to be given for the defendant.

Cited and followed in *Geddings v. Canfield*, 4 Conn. 482; *Mitchell v. Hazen*, Id. 495; *Griswold v. Johnson*, 5 Id. 366; *Fish v. Sawyer*, 11 Id. 551, and the principle applied in *Mitchell v. Hazen* and *Griswold v. Johnson*, to conveyances of land held in common: See *Bartlett v. Harlow* and *Varnum v. Abbott*, ante, 76, 87, and note to *Porter v. Hill*, 6 Am. Dec. 22. The case of *Hinman v. Leavenworth*, referred to in the opinion, was decided at a former term of the court, and is given in a note to the principal case. That also was a case of levy of an execution by metes and bounds upon the debtor's interest in a part of an estate held in common. Brainard, J., in deciding against the title so acquired, says that such a mode of levying "would put it in the power of a levying creditor virtually to make partition for himself—to carve his portion to suit his pleasure."

BULKLEY v. DERBY FISHING CO.

[2 Conn. 252.]

CONTRACT OF CORPORATION—USAGE.—Corporations may, by a course of usage, render themselves liable upon contracts executed in a different mode from that authorized by their charters.

ACTION on a policy of insurance upon a vessel. At the trial, the plaintiffs offered in evidence the policy declared upon signed "Canfield Gillet, president," and countersigned "Nathan Wheeler, assistant." The defendants objected to the evidence, because the policy did not appear to be countersigned by the secretary, as provided by the act authorizing the company to pursue the business of marine insurance. To obviate this objection the plaintiffs offered in evidence the correspondence between the insured and secretary of the company, and the registry of the policy by the secretary, to prove that the company had by its authorized officers ratified the policy; they also offered in evidence the book of records of policies of insurance kept by the company to show that it had not been the practice for the secretary to countersign the policies, and that many policies had been issued countersigned by the assistant like the one in suit. But the defendants objecting, the court rejected the evidence so offered by the plaintiffs, and directed the jury to find a verdict for the defendants, which they did. Motion for a new trial, the questions upon which were reserved for the advice of all the judges.

Daggett and Staples, for the plaintiffs, cited 2 Bac. Abr. 18 (Gwil. ed.); *Danforth v. Schoharie and Duaneburgh Turnpike Road*, 12 Johns. 227; *Spear v. Ladd*, 11 Mass. 94; *Hayden v. Middlesex Turnpike Co.*, 10 Id. 397 [6 Am. Dec. 143].

N. Smith and Bristol, for the defendants, cited *Head v. Provi-*

dence Ins. Co., 2 Cranch, 127; *Beatty v. Marine Ins. Co.*, 2 Johns. 103 [3 Am. Dec. 401].

SWIFT, C. J. In the acts constituting banks and other corporations, regulations are made with regard to the mode in which they are to transact their business, and render their engagements obligatory. To enable them to enforce the engagements made for their benefit, they must act within the scope of their authority, and conformably to the directions of law.

In all cases where banks and similar corporations conform to their charter, their acts are binding on them. So in cases where they do not conform literally to their charter, they may be liable. Suppose a banking corporation should, by a vote, agree to issue bills in a different form, or with different signatures, from those prescribed, they would by their own act be rendered liable to pay them. If such a corporation, without a vote, should introduce a usage and practice in the transaction of their business, different from that prescribed by law, they would, by the same reason, be rendered liable. For though such conduct might be improper in itself, yet the bank cannot take advantage of their own wrong to avoid their contracts. It cannot be supposed that in general those who dealt with them had knowledge of their deviation from the charter regulations; and it is to be presumed that they act according to law. If it be admitted that banks may thus deviate, and then avoid their contracts, they would be enabled to practice the grossest frauds on the community; especially in a country where there is such an immense number of moneyed institutions as in this, and where it is practicable for a very few to know the extent of their powers and regulations. Banks, like individuals, must be liable in the character which they hold out to the world; and whatever may be the forms of their obligations, if they are according to their charter, their corporate votes, or their known usage and practice, they ought to be binding.

A corporate act is not required in all cases. It is sufficient if there be a usage and practice under such circumstances as may be presumed to be within the general knowledge and by the consent of the company. Nor can the stockholders or members of the company be subjected to any inconvenience or damage. If any officer, vested with certain powers, should, in any instance violate them, and attempt illegally to subject the corporation to any obligation, such corporation may instantly, on the discovery, disavow the act and prevent a repetition. And then, as there will be neither law nor usage to sanction the transaction,

it will not be binding. But where the corporation will suffer such practice to continue, it is to be presumed that it is done with their consent, and be made obligatory on them. In the present case, it appears to me that the evidence offered conduced to prove that it was the usage and practice of this company to underwrite policies of insurance, and draw bills of exchange in the form now under consideration; and, of course, that it ought to have been admitted. Whether the evidence offered would have been sufficient to have satisfied the jury of the fact, is not now the question. We have only to decide on the relevancy; the jury must decide on the sufficiency of the testimony.

I am of opinion that a new trial ought to be granted.

TRUMBULL, BRAINARD and GODDARD, JJ., concurred in the opinion of the chief justice.

HOSMER, J., also advised a new trial, citing *Rex v. Bigg*, 3 P. Wms. 419, in addition to the authorities mentioned by counsel, as going "to the full length of deciding, that as against a corporation, an authority to its agent, different from the prescriptions of its charter, might be implied."

SMITH, J., did not agree with the chief justice on the ground taken by him, but acquiesced in the result, on the ground that the secretary had, in his correspondence with the insured, agreed to the policy in question, and had afterwards registered the policy.

GOULD, J., gave an opinion favoring a new trial, holding that as against a corporation, the contract of an agent appointed beyond the authority of its charter, may be binding, though it may be otherwise where the corporation itself claims a right under such contract, and cited *Ex parte Meymot*, 1 Atk. 196, as a case containing an analogous doctrine, where a clergyman prohibited by statute (21 Hen. 8) from trading, was nevertheless held liable for his contracts as a trader. He admitted it to be generally, though not universally, true that an aggregate corporation cannot confer express authority upon an agent, except by deed, but held that an appointment might well be implied from usual and frequent practice, and that if an authority by deed were requisite, it would in such case be presumed to have been so given, citing *The Mayor of Kingston upon Hull v. Horner*, Cowp. 102. He thought also that a usage of a corporation in the transaction of business was to be proved by the acts of its officers or acknowledged agents in the management

of its ordinary concerns, and that unlike the case of a presumption of title arising from long-continued possession and enjoyment, such usage need not be ancient.

EDMOND, J., dissented.

BALDWIN, J., gave no opinion, being interested in the funds of the corporation defendant.

New trial to be granted.

This case is cited in *Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 502; *Stamford Bank v. Ferris*, 17 Id. 259; and *Hood v. New York, etc., R. R. Co.*, 22 Id. 502, where the principle, that a corporation cannot excuse itself from liability upon contracts made in a manner not strictly in accordance with the requirements of its charter, if it has been in the practice of making them in that way, is approved and applied. It is cited also in *Peck v. New London Ins. Co.*, 22 Conn. 586; and *Hart v. Stone*, 30 Id. 96, upon the question of the liability of corporations for the acts of their agents. See on the doctrine of the principal case, and in accordance therewith, Angell & Ames on Corporations, sec. 237.

COUCH v. MEEKER.

[3 Conn. 302.]

NOTE AS ESCROW.—In an action upon a promissory note to which *non-assumpsit* is pleaded, the plaintiff may show by parol that it was delivered as an escrow, and what the conditions were upon which it was to take effect, and that there has been full performance on his part, and non-performance by the defendant, even though such conditions include a parol agreement for the sale of lands.

WHEN ESCROW TAKES EFFECT.—An escrow takes effect instantly upon the performance of the condition without any formal delivery over by the depository.

ACTION on a promissory note payable to the plaintiff. The defendant pleaded: 1. *Non-assumpsit*; and, 2. That there was a condition indorsed on the note as follows: "The condition of the within note is such that the said Meeker hath this day bargained his Starr farm (so called) to the said Couch; now, if the said Meeker stands to the bargain, the within note is to be void; if not, then the within note is to stand in full force," which condition the defendant averred he had performed. To the second plea the plaintiff replied that on the day of the making of the note it was agreed between the parties that the defendant should convey to the plaintiff the farm mentioned in the condition upon the consideration of certain promissory notes to be delivered to the defendant by the plaintiff; that the

note sued upon was executed to secure compliance by the defendant with this agreement; that the plaintiff had fully performed his part of the bargain, but that the defendant had wholly refused and neglected to convey the said farm. This replication was traversed by the defendant, and issue joined. At the trial it was proved that the note in question was signed by the defendant, and together with a certain other note signed by the plaintiff was put into the hands of one Benjamin Meeker as an escrow, it being understood that upon the failure of either of the parties to perform his part of the agreement then entered into, his note should take effect, and be delivered by the depository to the other party. The plaintiff then proved by parol, against the objection of the defendant, which was overruled by the court, that the bargain was substantially as set out in the replication, and that he had performed his part thereof, but that there had been an entire failure to perform on the defendant's side. There was a verdict for the plaintiff on both issues, and a motion for a new trial by the defendant. The questions of law upon this motion were reserved for the consideration of all the judges.

Sherman and Chapman, for the defendants, cited Rob. on Frauds, 10, 105, 108; Shep. Touch. 59.

N. Smith and Bissel, for the plaintiff.

SWIFT, C. J. The question in this case is, whether the contract is within the provisions of the statute against frauds and perjuries.

The statute is, that no suit in law or equity shall be brought or maintained upon any contract for the sale of lands, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or some other person by him authorized. This statute only requires that the agreement on which the action is brought should be in writing. This action is brought on a written obligation, complete in itself, and is warranted by a literal construction of the statute. Though it was delivered as an escrow, to take effect on the performance of certain conditions, which amounted to a contract for the sale of lands, yet such conditions are not required, by the terms of the statute, or any construction ever given it, to be in writing. These conditions are not part of the written contract, but only the terms upon which it was to take effect, or not; the proof of

them, then, is necessary only to prove the execution of a written contract. The proof of the execution of a written contract must be by parol; and it might as well be said that parol proof is not admissible respecting the delivery of a deed conveying lands, as to say, it cannot be admitted respecting the performance of the conditions on which such deed is to operate; for in both cases it is no more than proving the execution of the contract; and it has often occurred that deeds conveying lands have been delivered as escrows upon parol conditions, and they have never been considered as void by the statute of frauds and perjuries.

It has been argued, that this is in substance an action to recover damages for the breach of a parol contract for the sale of lands, though it is in form an action on a written contract. Admitting this to be true, there was, in substance, a written contract to pay a certain liquidated sum in damages, in case a parol contract for the sale of lands should not be performed. It is on this written contract that this action is founded; and is, of course, strictly conformable to the requirements of the statute.

It has been insisted that a court of equity could not have decreed a specific performance of the parol contract for the sale of the land in question; and that, of course, a court of law cannot give damages for the non-performance of it. It will be conceded that equity could not have interposed and compelled a specific performance of the bargain for the sale of the farm, for this rested in parol, and the note did not specify the terms of it. But there is no rule that a court of law will not give damages for the breach of a contract respecting the sale of lands, which equity cannot enforce. Of course, this mode of reasoning cannot be applicable to the case in question. It is said that written conditions were annexed to the note different from the parol conditions; and that proof could not be admitted respecting such parol conditions. But the efficacy of the note depended solely on the parol conditions, on which it was delivered as an escrow. Of course, it operated when these were performed, and the written conditions were immaterial. And though it was not formally delivered over by the depository to the plaintiff, yet it took effect in his hands the instant the conditions were performed, without any formal act of delivery on his part.

It was then proper to admit the plaintiff, on the general plea of *non-assumpsit*, to prove that the note was delivered as an escrow, and that the events had happened, or that he had per-

formed the conditions on which the note was to take effect, though these respected a parol contract for the sale of lands; for this was only proving the execution of the note, and such conditions are not within the statute.

As the plaintiff is entitled to judgment on the general plea, the questions arising on the special plea are immaterial. I would not advise a new trial.

All the judges were of the same opinion.

New trial not to be granted.

CHAPMAN v. CHAPMAN.

[2 CORN. 347.]

HEARSAY UPON QUESTION OF PEDIGREE.—Hearsay evidence, proving relationship, to be admissible, must come from a deceased member of the family, and be free from the presumption of interest or bias, and the name of the person making the declarations must be given by the witness.

IDEAL.—A declaration of a deceased member of a family that a person claiming an inheritance was an "heir" or "relative" of the ancestor, is not admissible to prove such inheritance. The particular relationship must be stated, so that the court may know whether the person was an heir or not.

TRESPASS *quare clausum fregit*. At the trial, the principal question was as to the title to the land upon which the trespass was alleged to have been committed. The plaintiff claimed title through one Mary Williams, from Nicholas Ackley, and to prove that the land came by inheritance from Ackley to the said Mary Williams, offered in evidence the deposition of one Crippin Hurd, which was in substance as follows: "I was connected with the Williams family; my mother's husband, before she married my father, being John Williams, who was the brother of Charles Williams. Being thus connected with the Williams family, and a good understanding subsisting between that family and ours, I have very often heard my connexions, and other people, speak of the fact that Lydia Ackley inherited the right of Nicholas Ackley in the common and undivided lands in Haddam, and that she was his relative; but what relative, whether the daughter or niece, I cannot say. Lydia Ackley married Thomas Robinson, by whom she had a daughter, named Mary Robinson, who married the above-mentioned Charles Williams, and was the sole heir of her parents." The defendant objected to this deposition, but the objection was overruled by the court. A verdict having been returned for the

plaintiff, there was a motion for a new trial, upon which the main question, reserved for the consideration of all the judges, was as to the admissibility of this deposition.

Sherman and C. Whittelsey, for the defendant, cited *Phillips* on Ev. 175; *Vowles v. Young*, 13 Ves. jun. 146; *Whitelocke v. Baker*, Id. 514.

Staples, for the plaintiff, cited *Doe v. Griffin*, 15 East, 293; *Goodright v. Moss*, Cowp. 594; *Jackson v. Cooley*, 8 Johns. 131.

SWIFT, C. J. It is a general principle in the law of evidence, that hearsay from a person not a party to the suit, is not admissible; because such person was not under oath, and the opposite party had no opportunity to cross-examine. But in ancient transactions, where no living witnesses can be had, it has become necessary to adopt a different rule; and in such cases it has been decided, that the declarations, *memoranda*, or entries made in writing, with regard to any facts, by persons in a situation to know the truth, and under no bias to misrepresent, shall be admitted as evidence of such facts; for this is the best evidence the nature of the case will admit of; and is, therefore, admissible from necessity.

The declarations of the deceased members of a family, or those who have lived in the family, and may, from their connection with it, be supposed to know the state of it, are admissible evidence to prove relationship; as, who was a person's father, or grandfather, whom he married, or how many children he had, or when he was married, or the birth of a child, or the like; for it cannot, in many cases, reasonably be presumed, that better evidence can be obtained.

It is not, however, every statement or tradition in the family that can be admitted in evidence. The declaration must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, they are speaking the truth, and cannot be mistaken; and when they are made for the express purpose of being given in evidence on a question of pedigree, they will not be received. If a person were to take up a bible, and, having the idea that it was afterwards to be produced in evidence, were to write down at once the births and deaths of his children, such an entry would not be admissible.

But the declarations of a deceased member of the family are not to be admitted, unless it appears that they have been made under such circumstances that the relation may be supposed to

be without an interest, and without a bias. If they were to be made on a subject in dispute, after the commencement of a suit, or after a controversy preparatory to one, they ought not to be received in evidence, on account of the probability that they were partially drawn from the deceased; or, perhaps, intended by him to serve one of the contending parties.

The opinions of deceased neighbors or acquaintances of the family are not evidence in a question of pedigree; for they cannot be supposed to have that certain knowledge which can be relied on. It is also essential that the relative should be deceased, to make his hearsay admissible; for otherwise he can be produced in court.

From this it appears, that the deceased relative, whose declarations are given in evidence, is to be considered as standing on the foot of a witness, and the hearsay declarations are admitted in lieu of his testimony. It is, therefore, essential that the relative whose declarations are given in evidence, should be named, so that the court may be enabled to know whether his relationship or connection with the family whose pedigree is in question, was such that he may be supposed to know the truth of the declarations; and whether he is free from any interest or bias, so that they are entitled to credit.

But, in the present case, the deponent does not name the person whose declarations he has sworn to; so that it cannot be known whether the relationship or connection with the family was such that they could know the truth of what they said, or whether they were under a bias or interest not to speak the truth. Nor does it appear, that the persons whose declarations are sworn to, are dead. Nor does the deponent testify to a declaration, from any person, that Lydia was the daughter of Nicholas Ackley, but only that she inherited the common and undivided land of Nicholas, and was his relative. To make the evidence admissible, he should have sworn to declarations of such relationship as made her the heir of Nicholas as to the land in question; for a general declaration by a living witness, that a certain person inherited the land of another, without being able to tell by what relationship, would be inadmissible.

In this opinion the other judges concurred, except Brainard and Gould, JJ., who gave no opinion; the former being related to one of the parties, and the latter not having heard the arguments of counsel.

New trial to be granted.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

JACKSON *v.* HART.

[12 JOHNSON, 77.]

IMPEACHMENT OF PATENT.—A patent not void on its face, which has been issued by mistake or on an insufficient suggestion, can only be avoided by some direct proceeding for that purpose. It cannot be impeached collaterally.

EJECTMENT for a certain lot of land. The plaintiff gave in evidence letters patent for the lot to one George Houseman, one of the lessors. The defendant offered in evidence an extract from the "balloting book," filed by the commissioners of the land-office with the secretary of state, relating to military bounty lands. The defendant offered parol evidence that no such person as Houseman served in the company, but that a person by the name of George Hosmer did serve therein, who was the person really entitled to the patent, and that the latter had left lawful issue, through whom defendant claimed. Objections being made to this evidence, it was excluded. The defendant then offered an extract from the balloting book, and parol evidence that it was a true extract, showing that Houseman died in the service, and insisted that if this evidence was admitted, the plaintiff, as the demise in the declaration was laid in 1810, ought to show a title in another lessor. This evidence was also rejected and the jury, under instruction, found for the plaintiff.

A motion was made to set aside the verdict and for a new trial.

Henry, for the defendant, contended the evidence was admissible: *Jackson v. Stanley*, 10 Johns. 133 [6 Am. Dec. 819].

Sill, contra, insisted that the patent was conclusive, and that there was an apparent contradiction between *Jackson v. Stanley*, and the decision in *Jackson v. Lawton* [6 Am. Dec. 311], which contains the true doctrine on this subject, that the only way of avoiding a patent is by *scire facias*, or process in chancery. There are two classes of cases: 1. Where there are two persons of the same name; and, 2. Where, for greater certainty, the description of the person controls and the name is rejected. In the first are the cases in 5 Co. 68; 2 Atk. 373, 239; and 3 Id. 258. In the second class are 6 T. B. 671; 2 Ves. 216; 2 Eq. Ca. Ab. 245; Ambler, 175.

PLATT, J. It is a first principle in the law of tenures, that the state is the only original source of titles, and that the state possesses a sovereign right to grant lands to whom it pleases, with or without consideration. These grants may be made either by statute or by patent under the great seal or by any public functionary designated by law for that purpose.

In this case, the public agents who were intrusted with the great seal for that purpose, have made a grant of record in the most solemn form to George Houseman, a real person capable of accepting the grant.

On the part of the defendant it is attempted to defeat the patent by showing that the bounty of the state was misapplied in making the grant to George Houseman, who served only as a soldier in the levies, whereas it ought to have been made to George Hosmer, who was a soldier in the line of this state during the war. It is admitted that here are two distinct names, and two real persons corresponding with them.

I think it is not the province of this court to inquire into the cause or motive which induced the state to make this grant, the terms of the patent being general, without any consideration expressed, and containing no reference to military services. We have no more right to make this inquiry in the case of a patent than in the case of a grant by express and positive statute. It is true that the state may be deceived, or a grant may be made through mistake, but the plain remedy is to vacate such grant by *scire facias*. There is no obstacle to such a proceeding in this case, as the counsel for the defendant seem to imagine. George Houseman is admitted to have been a real person, and, therefore, could be summoned on *scire facias*, or if he be dead, as is pretended, he has heirs, or if no heirs, then the lands have escheated.

But if the state have made an improvident or mistaken grant,

the state only can take advantage of it. If the state waives its right to vacate the patent, it seems to me altogether inadmissible that an individual who happens to be in possession of the land can exercise the sovereign power of the government in questioning the validity of this patent for his own private benefit. In the case of *Jackson v. Stanley*, 10 Johns. 133 [6 Am. Dec. 319], this court decided that it was competent for the plaintiff to prove by parol evidence and the ballot-book that a patent to David Hungerford was intended for Daniel Hungerford. The ground of that decision seems to be that "the omission or mistake of the christian name of the grantee rendered the grant void," *Humble v. Glover*, Cro. Eliz. 328, and that patent being void, it was competent for the legislature in that case, by statute, to grant the same land to Daniel Hungerford. This case is distinguishable from that above cited in two features: 1. The alleged mistake is here in the surname, and not merely in the christian name of the grantee: 2. The state has not in this case interfered to assert its right by a new legislative grant to the opposite claimant. I think the old remedy of summoning the patentee before a judicial tribunal, for the direct and express purpose of showing cause why the grant should not be vacated on the ground of fraud or mistake, is wisest and safest, if not the only constitutional mode of vacating such a grant. But whether the legislature can dispense with all the forms of judicial proceedings, and arbitrarily, upon an *ex parte* application, defeat a patent by a legislative act, need not be considered in this case, because the legislature have not attempted to assert the right of the state in that mode. If, however, this case is not distinguishable, in its essential features, from the case of *Jackson v. Stanley*, 10 Johns. 133 [6 Am. Dec. 319], I repose myself with entire satisfaction on the unanimous decision of this court in the case of *Jackson v. Lawton*, 10 Johns. 23 [6 Am. Dec. 311], and the authorities there cited. In that case the plaintiff claimed under a patent to George Mancius for lot number one hundred and twenty-eight in East Cayuga reservation, dated the twenty-eighth of October, 1811.

The defendant Lawton offered to give in evidence a patent to Stephen Allen for the same lot, bearing date the fifth of March, 1812, and also offered to prove that Allen was the occupant of the land, having by law the pre-emptive right; that he had paid the appraised value of the land, with interest, to the state, and that the first patent (to Mancius) was issued by mistake; which evidence was overruled at the trial, and this court sanctioned

that decision. Chief Justice Kent, in delivering the opinion of the court in that case, says: "The patent granted to the lessors of the plaintiff being the elder patent, is the highest evidence of title. As long as it remains in force, it is conclusive as against a junior patent." "Nor can the court take notice of any equitable claim upon the government which a third person might have had in respect to the lands in question." "If the elder patent was issued by mistake, or upon false suggestions, it is voidable only; and unless letters patent are absolutely void on the face of them, or the issuing them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading in which the fraud, irregularity or mistake, is directly put in issue." "The regular tribunal for this purpose is chancery, founded on a proceeding by *scire facias*, or by bill or information. It would be against precedent, and of dangerous consequences to titles, to permit letters patent (which are solemn grants of record) to be impeached collaterally, by parol proof, in this action."

The rule is indisputable, that parol evidence cannot be received to contradict or vary a written instrument of clear, certain and unequivocal import. A latent ambiguity may be explained by parol proof, in order to elucidate and explain written words of doubtful sense; as if a grant be made to John Smith, and there be several persons of that name, parol evidence is admissible to explain which of the persons bearing the same name was intended. So parol evidence would be admissible to prove that George Houseman and George Hosmer are the same person. But certainly it is not explaining a latent ambiguity to prove that a grant to George Houseman, a real person, was intended for another person of the name of George Hosmer. Such an extension of the rule would destroy the security of written conveyances. If a different person may be substituted by parol proof, for the person certainly described as grantee in a deed, there is no other essential part of the deed which might not be altered in the same way. Such a relaxation in the established rules of evidence, would defeat the spirit and policy of the statute of frauds, which requires conveyances of land to be in writing. And *cui bono*? It is not contended that this patent enures to the benefit of George Hosmer. The defendant is confessedly without any title to the land in question. To impeach a public grant of record, in this collateral manner, operates as an unfair surprise upon the patentee; it would supersede and abolish the safe and easy remedy by *scire facias*,

which is sanctioned by the wisdom and experience of ages, and in my judgment it would be a dangerous innovation.

I am therefore of opinion, that the plaintiff is entitled to judgment.

YATES and VAN NESS, JJ., concurred.

SPENCER, J., not having heard the argument, gave no opinion.

THOMPSON, C. J. The defendant is in possession under a title derived from George Hosmer, and is not, therefore, to be considered as standing on the footing of a mere naked occupant. And if the evidence on his part was admissible, it would show, conclusively, not only that George Houseman, who claims to be the patentee, was not the person intended, but that George Hosmer was the real patentee. It is not necessary to establish the latter branch of the alternative; for the defendant may rest his defense upon showing a title out of the lessor of the plaintiff; and if he can show that the patent was void, or that the person who claims to be the patentee was not the person intended, it will be sufficient.

The evidence offered was not for the purpose of contradicting the patent, but to explain a latent ambiguity and identify the patentee. It is admitted that the premises are a part of the land set apart as bounty lands for the two regiments belonging to this state; and it was not pretended in the argument that George Houseman came within this description of persons. Had the patent described the patentee as a soldier in Captain Wendell's company, in the first regiment, it would have been necessary for Houseman to have proved that he answered that description, although it would have been extrinsic evidence. And when the patent is silent as to description of the patentee, I can see no objection to the admission of extrinsic evidence to identify the patentee, any more than there would be to testimony to identify and locate the land granted. This is not evidence repugnant to or contradicting the patent. Nor is it, in fact, evidence which is necessarily to make void the patent, but only shows, that he who sets himself up as a patentee is an imposter. Can it be, that any man has a right to go to the secretary's office, and if he can find a patent issued to a person of the same name which he bears, that he can avail himself of such patent, and that his identity is not to be questioned? It is perfectly immaterial whether the opposition to his claim comes from one of the same name with the patentee or from any other person who has a right to dispute his title; and that the defend-

ant in ejectment has a right to show that the plaintiff has no title, cannot be denied.

Suppose it could have been shown that George Houseman, who claims the benefit of this patent, was a British soldier during the whole revolutionary war, might not this have been done? That may be said to be an extreme case. But if the principle be sound upon which the testimony offered was rejected, it would apply to the case I have put. For it would be nothing more than inquiring whether the lessor of the plaintiff was, in fact and in truth, the patentee, or person he pretended to be.

From the best consideration which I have been able to give this case, I cannot take it out of the principles which governed the decision in *Jackson v. Stanley*. The defendant there claimed title under David Hungerford, being the name of the patentee. But upon the trial, evidence was admitted to show that it was not David Hungerford who was intended as the patentee; and the competency of such evidence was sanctioned by the opinion of the whole court. Indeed, the very same evidence, to wit, the balloting book, which was decided in that case to be good evidence, has been here rejected.

This evidence was admitted in that case for the express purpose of showing that the patent was void, because there was no such person as David Hungerford, who was entitled to military lands, but that Daniel Hungerford was the person really intended. If this were not the principle which governed that case, I know not on what ground the plaintiff could recover. If, under the patent, the title was vested in David Hungerford, it was not, nor could be pretended, that the legislature could divest him of his title, and give it to Daniel Hungerford, the person really intended as the patentee. The patent to David must first be got rid of before the act of the legislature could take effect, and so it was considered by the court. Notwithstanding there was a person of the same name with the patentee, who claimed title to the land, the court said the patent was void, because he was not the person intended, and that it was competent to show this by parol evidence; and if such evidence is admissible, that which was offered in the case now before us was conclusive to show that George Houseman was not the person intended as patentee. We must, at all events, for the purposes of the present motion, assume that the proof would have established that fact.

I am persuaded that no solid distinction can, in principle, be

made between this case and that of *Jackson v. Stanley*. The great question, in both cases, is whether parol evidence is admissible to show that the person claiming to be the patentee was not the person intended. If there be any substantial difference in the two cases, it is much in favor of the defendant in this case; because the mistake there was in the Christian name and it was admitted on all hands, that Daniel Hungerford, who was the person really intended, could not take under that patent. But in the present case the mistake is in the surname, and it may well be questioned whether George Hosmer may not hold the title under this patent. The laws know only of one Christian name, but a person may have divers surnames, and it would have been competent for the defendant to have shown that George Hosmer was also known by the name of George Houseman: 5 Johns. 84; Co. Lit. 8 a; 15 Vin. tit. Misnomer, c. 5, 6, 413. And it is expressly laid down, as a rule on this subject, that in grants and obligations the mistake of the surname doth not vitiate, because there is no repugnancy that a person should have two surnames. It is, however, unnecessary to say that the title vested in George Hosmer; it is sufficient for the defendant to show that it did not vest in George Houseman, and that the testimony offered to establish that fact was admissible, is in my opinion settled in the case of *Jackson v. Stanley*. I am accordingly of opinion that a new trial ought to be granted.

Judgment for the plaintiff. *

See *White v. Jones*, and note 2 Am. Dec. 584; and *Strother v. Outley*, 3 Id. 683.

MERRITT v. CLASON.

[13 JOHNSON, 103.]

WRITING AND SIGNING MEMORANDUM.—A memorandum of a contract for the sale of goods was written by the broker employed to make the purchase, with a lead pencil in his book, in the presence of the vendor, and the names of the vendor and vendee, and the terms were stated in the body of the memorandum, but it was not subscribed by the parties. This was held sufficient within the statute of frauds.

BROKER AGENT FOR BOTH.—A broker employed to effect a purchase may act as the agent of both parties.

ASSUMPSIT brought to recover the difference between the amount of a certain sale of rye, and the contract price, which the defendant agreed to pay therefor. It appeared the defendant

employed a broker named Townsend to purchase rye, and he applied to Wright & Co., the plaintiffs' agents, and agreed to purchase the rye, and they authorized him to sell the same to the defendant, on the terms agreed on. He informed the defendant, who directed him to make the purchase accordingly. He went to Wright & Co., and closed the bargain, and wrote in their presence, in lead pencil, the following memorandum: "February 18, bought of Daniel and Isaac Merritt (the plaintiffs) by Isaac Wright & Son, 10,000 bushels of good merchantable rye, at one dollar per bushel, deliverable in the last ten or twelve days of April next, along side any vessel or wharf the purchaser may direct, for Isaac Clason, of New York, payable on delivery." Soon after, the broker informed the defendant of the purchase, but did not give him a copy of the memorandum.

The plaintiffs repeatedly tendered the rye to the defendant, according to the terms of the agreement, but he refused to accept. Thereafter the plaintiffs gave him notice that unless he paid for it, they would sell it at public auction, which was accordingly done. A verdict was found for the plaintiffs, subject to the opinion of the court on a case stated.

Wells and S. Jones, jun., for plaintiffs, insisted the broker was agent of both parties, and, therefore, could make a valid contract for the defendant. To make a valid contract within the statute it was not necessary that the writing should be actually signed by the party or his agent. It is enough if the contract be in writing, and authenticated by him. In *Wright v. Darmah*, 15 East, 103, the distinction is made between a memorandum made by one of the parties, and assented to by the other, and a memorandum made by a third person.

Baldwin and Ogden, contra. The writing must be signed by the party himself who is to be charged: *Champion v. Plumer*, 4 Bos. & P. 252; *Cooper v. Smith*, 15 East, 103.

By Court, PLATT, J. The only point is, whether the memorandum made by John Townsend was a sufficient memorandum of the contract, within the statute of frauds to bind the defendant. It is objected by the defendant's counsel: 1. That the memorandum is not in writing being made with a lead pencil only; 2. That it is not signed by the defendant nor by his agent; 3. That it is not binding on the defendant, because his agent did not furnish him with a copy of it.

I have no doubt that the memorandum required by the statute, may as well be written with a lead pencil as with a pen

and ink; and it is observable that in most of the reported cases on this head, the memoranda were written with a lead pencil, and no counsel, until now, has ever raised that objection. I think it clear, also, from the authorities, that this memorandum was signed according to the statute. It is not disputed, that the authorization of the agent, for such purpose, need not be in writing. In the body of this memorandum the name of Isaac Clason, the defendant, is written by his agent, whom he had expressly authorized to make this contract. The memorandum, therefore, is equally binding on the defendant as if he had written it with his own hand, and if he had used his own hand instead of the hand of his agent, the law is well settled, that it is immaterial, in such a case, whether the name is written at the top, or in the body, or at the bottom of the memorandum. It is equally a signing within the statute: *Saunderson v. Jackson*, 2 Bos. & P. 237; 1 Esp. 199; 1 P. Wms. 770, note 1.

The third objection is absurd. If the defendant's agent neglected his duty in not furnishing his employer with a copy of this memorandum, it certainly cannot affect the rights of the plaintiffs, under that agreement.

The memorandum states, with reasonable certainty, every essential part of the agreement. The court are of opinion that the plaintiffs are entitled to judgment.

The authority of this case is considered in *Justice v. Lang*, 42 N. Y. 493. Here it is held that at common law, accepting from a party his written agreement to deliver goods at a specified price, "cash upon such delivery," implied a promise to pay the price when the goods should be delivered, which furnished sufficient consideration for the agreement to deliver, and rendered the contract valid and binding. The signing such an instrument by a vendor takes the contract out of the statute of frauds, and binds him, although it is not subscribed by the vendee.

This decision very ably traces the statutory provisions and the adjudications thereon in New York. Referring to the principal case, the court, after stating the facts of the case, say: "Platt, J., in delivering the opinion of the court, stated that the only point was whether the memorandum, made by John Townsend, was a sufficient memorandum of the contract within the statute of frauds, to bind the defendant; and after expressing an opinion on other questions presented by the case, he came to the conclusion that the memorandum stated, with reasonable certainty, every essential part of the agreement, and that the plaintiffs were entitled to judgment."

The principal case was carried to the court of errors on a special verdict, and is reported in 14 Johns. 484, under the title of *Executors of Clason v. Merritt*. Here the point was again raised that the agreement was not signed by both parties, and Chancellor Kent, giving the opinion of the court, says: "Clason's name was inserted in the contract, by his authorized agent, and if

it were admitted that the name of the other party was not there by their direction, yet the better opinion is, that Clason, the party who is sought to be charged, is estopped, by his name, from saying that the contract was not duly signed within the purview of the statute of frauds; and that it is sufficient, if the agreement be signed by the party to be charged. It appears to me, that this is the result of the weight of authority, both in the courts of law and equity. * * *

Clason, who signed the agreement, and is the party sought to be charged, is, then, according to the authorities, bound by the agreement, and he cannot set up the statute in bar. But I do not deem it absolutely necessary to place the cause on this ground, though, as the question was raised and discussed, I thought it would be useful to advert to the most material cases, and to trace the doctrine through the course of authority. In my opinion, the objection itself is not well founded in point of fact."

The question was also raised as to whether a writing in lead pencil was sufficient; and passing on this the chancellor says: "The statute of frauds, in respect to such contracts as the one before us, did not require any formal and solemn instrument. It only required a *note* or *memorandum* which imports an informal writing done on the spot, in the moment and hurry and tumult of commercial business. A lead pencil is generally the most accessible and convenient instrument of writing, on such occasions, and I see no good reason why we should wish to put an interdict on all memoranda written with a pencil. I am persuaded it would be attended with much inconvenience, and afford more opportunities and temptation to parties to break faith with each other, than by allowing writing with a pencil to stand. It is no doubt very much in use. The courts have frequently seen such papers before them, and have always assumed them to be valid. This is a sanction not to be disregarded."

The principal case is followed on this point in *Myers v. Vanderbilt*, 84 Pa. St. 510, decided in 1877, where Mercur, J., says: "Writing is the expression of ideas by visible letters. It may be on paper, wood, stone, or other material. The ten commandments were written with the finger of God on tables of stone: Exod. xxxi, 18. The general rule undoubtedly is, that wherever a statute or usage requires a writing, it must be made on paper or parchment; but it is not essentially necessary it be in ink; it may be in pencil. This view is sustained by numerous authorities as applied to contracts generally: *Chitty on Contr.* 91; *Jeffery v. Walton*, 2 Eng. Com. L. R. 385; *Gray v. Physic*, 11 Id. 443; *Merritt v. Clason*, 12 Johns. 102; *Clason v. Bailey*, 14 Id. 490. The same rule applies to promissory notes: *Byles on Bills*, 134; *Story on Prom. Notes*, sec. 11; *Gray v. Physic*, *supra*; *Closson v. Stearns*, 4 Vt. 11; *Partridge v. Davis*, 20 Id. 490; *Brown v. Butchers' Bank*, 6 Hill, 443."

In regard to *signing*, so as to comply with the statute, it is thus stated in *Brown on Stat. of Frauds*, sec. 365: "The requisition of the statute in the fourth section, is that the memorandum be signed *by the party to be charged*. And it is now uniformly held that, under this clause, the signature of the defendant alone, or the party who is to be charged upon the agreement, is sufficient, although, as we shall see hereafter, it is necessary in another view, that the plaintiff, or party in whose favor the engagement is made, be designated in the memorandum. In the seventeenth section, relating to the sale of goods, etc., the word *parties*, in the plural, is used; and from this difference it appears to have been once considered that both must sign a memorandum, to be binding under that section. Later decisions, however, reject the distinction, and place both sections under the same construction; and, indeed, as we have taken the liberty to remark once or twice before, it would

be manifestly unsafe, even if it were possible with consistency, to base broad rules of interpretation upon mere literal variations in the language of different parts of an enactment so incoherently drawn as the statute of frauds and perjuries."

That the agreement is sufficient, and may be enforced, if signed by the party to be charged, is held in *Justice v. Lang*, *supra*; *Vassault v. Edwards*, 43 Cal. 458; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Slater v. Smith*, 117 Mass. 96; *Lowry v. Mehaffy*, 10 Watts, 387; *Barry v. Coombe*, 1 Peters, 640; *Johnson v. Buck*, 6 Vroom, 338.

SALTUS v. OCEAN INS. Co.

[12 JOHNSON, 107.]

DUTY IN RESPECT TO CARGO WHEN DISABLED.—The master is bound, when the ship becomes disabled during her voyage, to procure another vessel, if in his power, to bring the cargo to the port of destination; but he is not bound to seek another vessel out of the port of distress, or out of a port immediately contiguous thereto.

RECOVERY FOR TOTAL LOSS.—A policy was made on freight from Riga to New York. The bulk of the cargo consisted of hemp, and the residue of manufactured goods and iron. The vessel sprung a leak and put into Kinsale in distress, where, after a survey, she was found incapable of prosecuting her voyage, unless repaired at an expense equal to her value; and the master, with the advice of the merchants and others at Kinsale, sold the hemp there, and shipped the residue of the cargo in another vessel to New York, which, however, was not capable of taking more than one third of the hemp, as there was no machinery to pack and stow it in the Russian mode. It was held that the insured were entitled to recover for a total loss of the freight, it not appearing that the goods re-shipped had reached New York, or that any freight had been earned.

ACTION on a policy of seven thousand dollars upon the freight of the ship "Hudson," at and from Riga to New York. The cargo consisted of fifteen tons of manufactured goods, eighty tons of iron and a certain quantity of hemp. The master testified that the ship sailed from Riga, in Russia, in October, 1810, for New York. In the North sea she experienced boisterous weather and began to leak, so much so, that when off the Irish coast it was found necessary to put into Kinsale to repair, where she arrived in November, and was there surveyed and repaired without unloading her cargo. On the twenty-eighth of December, she set sail for New York, and after proceeding about five hundred miles she encountered heavy winds and sea, by which she sprung a leak so that she could not be kept free with both pumps. It became necessary, therefore, to seek a port of safety. He was, however, advised by the commander of an English frigate to abandon, but he returned to Kinsale in Janu-

ary, 1811, and ran the ship into the mud to prevent her sinking. Another survey was then made, and it was found the cost of repairing would be almost equal to her value. The cargo was then landed and the vessel sold at auction. During this survey her timbers were found rotten. The master stated that had he known this state of the vessel he would not have left Riga at that season of the year, without having her thoroughly repaired, which could have been done there at half the expense which it would cost at Kinsale. He had no doubt that in ordinary weather the vessel could have safely performed the voyage. From his subsequent knowledge of the vessel he was led to believe that when she left Riga she was insufficient for the voyage, though she might have been competent for a summer voyage; and at the time of her departure her sails and rigging were in good order, and were so when she was sold at Kinsale.

The master hired a Baltimore vessel, for two hundred pounds sterling, at Kinsale, to bring home the manufactured goods and iron, composing part of the Hudson's cargo. This vessel was not one fourth loaded, but the hemp could not have been taken out of the Hudson in bales; and the rebinding and stowing it in another ship would have been equal to its value. There were only two other American vessels at Kinsale, neither of which was bound to the United States, and they had cargoes. There were twelve or more American vessels at Cork, which is sixteen miles from Kinsale. The master made no attempt to procure any of them to bring home the hemp, which he supposed they would have done on a freight. The hemp was landed and sold at auction at Kinsale. In disposing of the hemp the master acted by the advice of a mercantile house and two American captains there. The Hudson, on her arriving at Kinsale, had performed about one third of her voyage. The goods on board the vessel chartered at Baltimore, on arrival in New York were seized by the collector of the customs.

Several witnesses for the defendants, acquainted with the Russia and Irish trade, stated their opinion that the hemp might have been packed with jack-screws; that in consequence of the non-intercourse law it might have been reshipped to this country for a fourth or an eighth of the usual freight, and that four tenths of the voyage was performed from Riga to Kinsale as to the distance. It was agreed that the amount of general average, if any was claimable, should be adjusted by persons to be appointed by the court.

The jury were charged that if they found the vessel sea-

worthy, and if, in their opinion, the hemp could not be re-shipped in a merchantable condition, or the expenses of reshipment and transportation to New York in another vessel, would have increased the freight to more than a moiety of the freight as valued in the policy, they ought to find a verdict for the plaintiffs for the amount insured, as for a total loss, deducting a *pro rata* freight from Riga to Kinsale, being four tenths of the voyage insured, and that the defendants were not entitled to any allowance or deduction on account of the iron and manufactured goods which were transported to New York in another vessel.

The jury found a verdict for the plaintiffs for a total loss, after deducting a *pro rata* freight of four tenths, and a general average to be adjusted by the court.

A motion was made to set aside the verdict and for a new trial.

Griffin, for defendants, contended; 1. That the vessel was not seaworthy when the policy attached; 2. That the assured ought to have sent home the whole cargo by another vessel *Abbot*, 195; *Schiffelin v. New York Ins. Co.*, 9 Johns. 21; 3. If the insured were unable to bring home the whole cargo in another vessel or vessels, their inability to do so arose from the peculiar nature of the cargo, which circumstance ought not to affect the insurers: 3 Johns. Cas. 93; 1 Id. 293; 3 Johns. 321; 4. That the defendants were entitled to an allowance or deduction for that part of the cargo which arrived at New York: *Abbot*, 244; *Park*, 70, 71; 2 Johns. Cas. 233.

Hoffman and T. A. Emmet, contra.

By Court, *YATES, J.* There can be no reasonable doubt of the seaworthiness of the vessel when the policy attached. The captain does not declare satisfactorily what her situation really was when she left Riga; but is explicit as to her ability to perform the voyage had he experienced ordinary weather; and he says that a perfectly sound vessel would hardly have withstood the storm he experienced; yet, if he had known her situation, he would not have gone in her. This opinion, however, appears to be formed altogether on the discovery of the decayed timbers in her at Kinsale. The carpenter states that the rottenness of those timbers, in the part of the vessel described by the master, could not make her unseaworthy, as little or no stress could come on the place where they were found. The weight of evidence appears decidedly in favor of her seaworthiness;

and, of course, warranted the verdict of the jury, and they having passed upon it, their decision ought to be conclusive. The policy being on freight, it is urged that the master ought to have sent home the whole cargo by another vessel or vessels.

That the master has a right to hire another vessel, and carry on the cargo, so as to entitle him to his freight, has at all times been allowed; and the decision of this court in *Schieffelin v. New York Ins. Co.*, 9 Johns. 21, establishes the principle that it is his duty to find another vessel by which to carry the goods to the place of destination, if it is in his power to do so. It never was intended by this decision to make it incumbent upon the master to procure a vessel elsewhere, out of the port of distress, or out of a port immediately contiguous; and such limitation is perfectly correct, because the extension of this rule, as contended for, would be attended with insurmountable difficulties and embarrassments to masters. In the present case he would have been obliged to travel sixteen miles, the distance between Kinsale and Cork, and what his conduct ought to be, if the distance had been greater, could not be ascertained. It would be requiring an act as a duty, the extent of which the master could not at all times know or understand. A due regard, therefore, to the protection of masters of vessels, as well as the interest of the assured, renders some limitation indispensable; and that must necessarily be by confining the inquiry or search for another vessel to the same port, and no other, unless it be a port contiguous and at hand. In this case, on vessel could be obtained at Kinsale; he was, therefore, under no obligation to procure one at Cork; and such being the true and correct definition of the master's duty, it was not necessary for the plaintiff to show that the attempt had been made to procure a vessel at Cork. Admitting, however, that it would be the captain's duty with an ordinary cargo to procure a vessel at Cork to send it on, no such obligation could possibly exist in this case, as the situation of the cargo rendered a re-shipment improper.

It appears evident that the master, throughout the whole business, acted in good faith. He consulted one of the most respectable mercantile houses at Cork, as well as two American captains, who were there at the same time, and who saw the situation of the cargo. They all concurred in advising the sale of the hemp, no doubt from a conviction that to carry it to the place of destination would be detrimental to the owners. It appears that it would have required three or four vessels of the Hud-

son's size to take it, in consequence of its elasticity, and that the Friendship could have carried but thirty tons of it. The captain could not, therefore, be chargeable with negligence for not separating the article, and shipping so small a part of it loose, and at an extra expense, when obliged to dispose of the residue. It would have been a measure manifestly against the interest of the owners; for all the witnesses agree, that a re-shipment of the hemp, in a merchantable condition, would have increased the expense enormously; and some of them declare, that to stow it in a vessel, as it had before been in the Hudson, would have made the expense equal to its value, for the want of proper machinery for the purpose at Kinsale; and such must have been the opinion of the jury under the directions given them, and expressed by their verdict, that those expenses would have amounted to a sum so extravagant as to forbid a reshhipment with such a cargo. It is, therefore, to say the least, extremely questionable whether the master, who acted in good faith, was not perfectly justifiable. Having, however, before shown that the inquiry ought to be confined to the same port, or one contiguous to it, it is not necessary to decide this cause on any other ground. It is contended that the underwriters ought to be allowed the amount expended on account of a part of the cargo which reached its port of destination.

They are certainly not entitled, upon any principle, to a deduction beyond a proportionate allowance for freight actually earned; and to authorize such deduction, it was incumbent on the defendants to show that those articles had been delivered to the plaintiffs at the port of destination, or to bring home to them notice of their arrival and seizure; but no delivery or notice to them appeared on the trial. They therefore cannot claim a compensation in this instance.

Judgment for the plaintiffs.

GARLICK v. JAMES.

[12 JOHNSON, 146.]

PROPERTY IN PLEDGE.—A promissory note of a third person, deposited by a debtor with his creditor as collateral security for a debt, is a pledge in which the pawnee has merely a special property, the general ownership remaining in the pawnor.

RIGHT OF PAWNEE TO SELL.—Where the pledge is for an indefinite period, the pawnor should be called on to redeem before the pawnee can dispose of the property, and if he is absent, or cannot be found, judicial proceedings should be had to bar his right of redemption.

ACTION on the case. The facts are stated in the opinion. A verdict was taken for the plaintiff by consent, subject to the opinion of the court.

H. Bleecker, for plaintiff.

Henry, *contra*.

By Court, THOMPSON, C. J. The plaintiff and one Murphy being indebted to James & M'Cabe on a balance of account for merchandise, the plaintiff left with the defendant as collateral security a note drawn by Seth Garlick to him, for six hundred dollars, dated the first of November, 1802. Some time in the year 1810 the defendant gave up the note to Seth Garlick for three hundred dollars; and this suit is brought to recover the difference between the amount of the note, and balance of accounts due to James & M'Cabe. That the note thus deposited with the defendant is to be considered and treated as a pledge, cannot admit of a doubt. It was delivered, with a right to detain it as collateral security, for the balance due James & M'Cabe. But the legal property did not pass. The general ownership remained with the plaintiff, and the defendant only acquired a special property therein; and if so, he has clearly exceeded his authority in disposing of it as he has done.

In the very able and learned examination of the rights and duties of a pawnee, in the case of *Cortelyou v. Lansing*, 2 Cai. Cas. 200 [see note, *infra*], most of the law on the subject of pledges has been collected. And I believe it may be safely affirmed that no case is to be found where the deposit was for an indefinite time, as it was in the case before us, that the sale or disposition of the pledge by the pawnee, without first calling upon the pawnor to redeem has been held good. It may be said here, as was said in that case, that it is unnecessary to decide in what manner this call is to be made or how the pledge is to be disposed of in case of the pawnor's default to redeem; for in this case the pawnor was not called upon, in any manner whatever, to redeem. It was urged on the argument that this could not be done because the plaintiff had absconded. If notice to redeem could not have been given personally to the plaintiff, the disposition of the pledge should have been authorized and sanctioned by judicial proceedings. The authority of the defendant, with respect to the note, could extend no further than to receiving the money due upon it, without first calling upon the plaintiff in some way to redeem. The money, when received, would be a substitute for the note,

and to be held upon the same terms, and subject to the same rights and duties as the note. And if the defendant undertook to compromise with the drawer of the note, and received a less sum than was due, he did it at his peril, as he acted without authority.

Although it is admitted in the case that the defendant acted in good faith, it is difficult to discover the reason of his making the sacrifice he did in accepting of less than one half the sum due upon the note; for it is in proof that the settlement was made with Seth Garlick, personally, and that he was at the time abundantly able to pay the full amount of the note. It was urged, on the part of the defendant, that the plaintiff might still call upon Seth Garlick for the balance due upon the note, as the payment made by him being for a less sum than was due, it would not operate as a discharge of the note. Admitting this to be correct, it will not exonerate the defendant if he has so disposed of the pledge as to make himself responsible. A party may have two remedies for an injury, and may elect which to pursue.

In whatever light, therefore, the case is viewed, the plaintiff is entitled to recover, and must have judgment for five hundred and twenty-five dollars, being the difference between the amount of the note and the balance of account due from Murphy and Garlick to James & M'Cabe, according to the stipulation of the parties. Several other questions would appear to arise out of the case as presented to the court, but they were abandoned on the argument.

Judgment for the plaintiff.

That a pawnee cannot sell without giving notice to the pawnor, is laid down in the leading case of *Markham v. Jaudon*, 41 N. Y. 235.

In *Cortelyou v. Lansing*, 2 Cai. Cas. 200, referred to, the law regarding pledges is learnedly examined by Kent, J. This was an action of assumpsit under the following circumstances. On the twenty-ninth of April, 1786, one Antill deposited with the defendant a certain note taking from him a receipt, which stated the nominal amount of said note, and the debt for which it was given as security. The defendant in October, 1788, disposed of the note at the highest market price that could be obtained. In 1791, or 1792, Antill died, and administration being granted to the plaintiff, he in 1799, went to the defendant's house to demand the certificate, but in consequence of the defendant's illness, he could not be seen. There was no evidence that the plaintiff had any money at the time to tender to the defendant.

The opinion of the court was delivered by Kent, J., in which he discussed: 1. The right to dispose of the security; 2. Whether the property in the pledge had become absolute by the death of the pledgor; 3. Whether a tender was requisite before suit, and, 4. Whether the measure of damages was in the discretion of the jury.

KENT, J. The two first questions raised in this case, respect the rights of the parties over the depreciation note thus deposited with the defendant; the one claiming a right to redeem, and the other to sell it; each reciprocally denying the other's pretensions. But the books involve the inquirer in considerable doubt and difficulty in the discussion of these questions, nor do the English courts appear to have defined and settled them with their usual accuracy and precision.

The note in question came under the strict definition of a pledge: Dig. lib. 13, tit. 7, sec. 9; 1 Hub. 291, sec. 15; Brooke's Ab. tit. Pledges, 20; 2 Ves. Jun. 378; 1 Powell on Mortg. 3; Bracton, 99 b. It was delivered to the defendant with a right to detain, as a security, for his debt, but the legal property did not pass, as it does in the case of a mortgage, with a condition of a defeasance. The general ownership remained with the intestate, and only a special property passed to the defendant. It is, therefore, to be distinguished from a mortgage of goods, for that is an absolute pledge, to become an absolute interest if not redeemed at a fixed time. Besides, delivery is essential to a pledge, but a mortgage of goods is, in certain cases, valid without delivery. The mortgage and the pledge, or pawn of goods seem, however, generally to have been confounded in the books, and it was not until lately that this just discrimination has been well attended to and explained. I find no difficulty in saying that the defendant had no authority to sell the pledge at the time he sold it. It was at that time, an illegal conversion of the intestate's property. The pledge was delivered without any specified time of payment or redemption. It was to remain in the defendant's hands to be delivered upon payment. The cases relied on by the defendant's counsel admit, that in such a case, the pawnor has his whole life-time to redeem. If this be so, the defendant had no right to sell during the pawnor's life, because the one right would be inconsistent with the other. The expression, however, that the pawnor has his life, as a time to redeem, where no time of redemption is fixed, must be taken with this qualification, that the defendant does not, in the mean time, call upon him to redeem. This he certainly must have a right to do. The manner in which that call is to be made, and in case of the pawnor's default, the manner of disposal of the pledge, are distinct points which I need not now discuss, because in the present case, no call whatever was made upon the intestate, previous to the sale of the note. There is no instance to be found, in case of a deposit, for an indefinite time, where the pawnee sold in the life-time of the pawnor, and without making a previous demand, that such sale was held good. The sale by the defendant was, therefore, clearly unauthorized and illegal.

The next, and the more difficult question is, whether the representatives of the pawnor have a right to call upon the defendant to restore the pledge or its equivalent. That the intestate had such a right is not to be disputed, and the point is, whether it be such a right of action as died with the person, or whether, as in all other cases of a right of action, not founded on a personal tort, it descended to the plaintiff. If the right of action did not descend, this will be the first case, I apprehend, that ever existed in which the remedy for the conversion of one's property was limited to the life-time of the party injured. But it is said to be immaterial what was the defendant's conduct in respect to the pledge, since where no time was fixed, the pawnor must redeem in his life-time, and if he dies without redeeming, the property in the pledge becomes absolute in the pawnee. This last proposition has so much countenance in the books that, to determine on its validity, it will be necessary to bestow a considerable attention on the cases, and if I am not greatly mis-

taken the result will show that it is wholly destitute of any solid foundation. [Here the authority of several cases was examined, and the opinion proceeded.] From this review of the cases I conclude that whatever right to redeem existed in the pawnor at his death, that right descended entire and unimpaired to his representative. There are two decisions fully to this effect, and there is not a decision to the contrary, or one which establishes that if no time be limited to redeem a pawn, the right to redeem is extinguished by the pawnor's death.

The third point raised in this case is as to the necessity of payment or tender of the money loaned previous to the commencement of the suit. The payment of the money, and the return of the pledge, were to be concurrent acts, to be performed by each party at the same time and place. Each must show a capacity and readiness to perform, and yet neither was to trust the other personally. The one was not actually to part with his money, unless the other at the same time showed a capacity and readiness to return the pledge; nor was the one to return the pledge until the other showed at the same time the like capacity and readiness to pay the money; the acts being reciprocal, and one dependent upon the other. But when one party has incapacitated himself to perform his part of the contract, there is no need of the other coming forward at the time to make a tender, or to show himself in a capacity to pay, because it would be a nugatory act which the law will never require. If the one party *discharges* the other from a performance, by saying he will not perform on his part (and voluntarily and tortiously rendering himself unable to perform his part is equivalent to such discharge), it is well understood that it is not necessary for the other party to go forward. This was so decided in the case of *Jones v. Barkley*, Doug. 684, and the same principle has frequently been advanced in other cases. [See in point *Kennedy v. Kennedy*, 5 Am. Dec. 629.]

The last question is as to the rule of damages. If the direction of the judge was correct, or if the rule is to be given by the court, then the verdict is to stand, and to be made conformable to such rule. But if the damages are to be considered as in any degree subject to the discretion of the jury a new trial is to be awarded. There is no doubt but that the measure of damages is sometimes a question of law, but more frequently it is to be left at large to the discretion of a jury. In cases where there is a criterion for an accurate computation, that criterion must be followed, and it becomes then a rule of law.

The value of the depreciation note is the measure of damages in the present case; and the only question is, how that value is to be ascertained. If it is to be ascertained from the face of the note; or from what time is that value to be computed? There must be some rule or principle on the subject, and that principle, whatever it may be, is a question of law, and not of an arbitrary *ad libitum* discretion of the jury. A great part of our common law jurisprudence is only a collection of principles, to be selected and applied to particular cases, by the discernment and diligence of the courts. I have no doubt the rule in the present case is a rule of law, and the only examination is to discover it.

The direction at the trial was, the value of the certificate in 1799, when the plaintiff went to make a demand. This must not be understood to mean that the cause of action arose then. From that ground, the direction would have been erroneous. Putting out of view the previous sale, the plaintiff has not shown a cause of action by his act in 1799, for he ought at least to have shown that he went with a readiness and a capacity to pay. The mental inability of the defendant, may have rendered him incapable of receiving an

actual demand from the plaintiff, but surely is not to be construed into a discharge to the plaintiff, from the performance of his duty, which was to come with a disposition and ability to perform his part of the contract; that act of the plaintiff was, therefore, wholly immaterial as a ground of action, and if the value of the note is to be estimated from that date, it must be because the plaintiff manifested his will to have it then restored. The value of the chattel at the time of the conversion, is not, in all cases, the rule of damages in trover; if the thing be of a determinate and fixed value, it may be the rule, but where there is an uncertainty, or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it, at the time he calls upon the defendant to restore it, and one of the cases even carries the value down to the time of the trial. * * * I have no doubt that it is just and right that the plaintiff in the present case ought to recover the value of the note at the time he chose to demand it; he has selected that time to call for the note, and to liquidate its value, and no other measure of damages short of that, will indemnify him for the loss of the pledge; I agree, therefore, on this ground to the direction that was given.

McMILLAN v. VANDERLIP.

[12 JOHNSON, 166.]

ENTIRETY OF CONTRACT.—Where a person agreed to work for another for a certain time, and to spin yarn at three cents per run, and afterwards left his service, and brought an action for spinning a certain number of runs, at the agreed price, it was held that the contract was entire, and must be performed as a condition precedent before any action could be maintained for the price of the labor.

ERROR on certiorari from a justice's court. Vanderlip sued McMillan in an action on the case. He stated his demand to be for "spinning eight hundred and forty-five runs of yarn, at three pence per run; for damage for not finding a sizable jenny, ten dollars; for damage for not finding a sufficient instructor, ten dollars; for damage for spinning bad roving, ten dollars; for damage for time lost, for want of roving, five dollars." The defendant pleaded the general issue, and there was a trial by jury.

The plaintiff proved that he had worked for the defendants below eleven or thirteen weeks; and a witness stated that the plaintiff said he was to work one year, to spin at three cents per run; but should not make wages the roving was so bad. Another witness said he understood from the defendants, that the plaintiff had agreed to work with the defendants, ten and a half months at three cents per run; and an account was produced in which the defendants charged the plaintiff three dollars paid to him, and credited him with spinning eight hundred and forty-

five runs of yarn. One of the witnesses said he was to have five cents a run, and his board; and he said he understood from all parties, that Vanderlip was to have three cents per run, and work ten and a half months. In an additional return, it was stated by the justice, that it was understood by him, and he believed by the jury, that the plaintiff below left the service of the defendants at the date of the account; though he did not recollect that it was either proved or admitted. The jury found a verdict for the plaintiff, on which judgment was given.

Wendell, for plaintiff in error.

Crary, contra.

By Court, SPENCER, J. The question is, whether the contract of the defendant in error is an entire contract, operating as a condition precedent; and as such, necessary to be performed before the plaintiffs in error were liable; or whether we are to consider the agreement to pay three cents per run as a distinct agreement on the one side, and the promise to work for ten and a half months as independent and unconnected with the rate at which the defendant in error was to spin the yarn. It has been well observed by Sergeant Williams, in a note to *Pordage v. Cole*, 1 Saund. 320, n. 4, that the old cases proceeded on very subtle and nice distinctions; and it might have been added that some of them were carried to a length that worked great injustice, and defeated the intentions and understandings of men not versed in nice and technical rules. To show to what unreasonable results the courts arrived, I will barely mention two cases. A. agreed to serve B. a year, and B. agreed to pay him ten pounds, and it was held A. might maintain an action against B. for the money before any service. Again, A. covenanted with B. to marry his daughter; and B. covenanted to convey an estate to A. and to the daughter in special tail, though A. marry another woman, or the daughter marries another man, A. may maintain an action against B. on the covenant.

The good sense of modern times has exploded these subtle notions, and contracts are now expounded according to the real intention of the parties. Thus, in *Waddington v. Oliver*, 5 Bos. & P. 2 (N. S.) 61, the plaintiff sold the defendant one hundred bags of hops at fifty-six shillings per hundred, to be delivered on or before the first January, 1805, as might be agreeable to the plaintiff. On the twelfth December, twelve bags were delivered, and payment was immediately demanded; and

on refusal to pay, a suit was brought. The court were clearly of opinion that the contract was entire, and could not be split, and that the plaintiff had no right to bring an action until the whole quantity was delivered, or until the time for delivery of the whole had arrived. The third note of Sergeant Williams to 2 Saund. 352, furnishes a variety of cases, showing the grounds on which the latter cases have placed the dependency or independency of contracts. There are many distinctions, not necessary now to be noticed; but the object of them is to promote substantial justice by ascertaining the intention of the parties, and carrying them into effect without a literal adherence to words, or the order of sentences.

It is evident to my mind that the parties before us intended that Vanderlip should serve the McMillans for ten and a half months, and that he should be paid three cents for each run of yarn spun by him, and that they intended this as one entire contract. The McMillans could not mean to have paid by the run, and to subject themselves to a suit, *toties quoties*. We have a right to infer from the plaintiff's declaration in the court below, as well as from the fact that one of the witnesses was to have five cents a run, that Vanderlip was a novice in spinning; and consequently that he would be more profitable to his employers in the latter part of the term. If the contract was entire, and looked as well to the price per run as to the time of service, it necessarily formed a condition precedent; and then Vanderlip could not sue until he had performed his contract of service, or until the period within which it was to be performed had elapsed. The latter qualification is drawn from the case of *Waddington v. Oliver*, though I confess I do not perceive the grounds on which it rests. It appears to me that the construction I have put on this contract is not only warranted by the agreement itself, but that it is a very useful and salutary one. The general practice in hiring laborers or artisans is for six or twelve months, at so much per month. The farmer hires a man for six or twelve months, at monthly wages; and he takes his chance of the good with the bad months. It is well known that the labor of a man during the summer months is worth double the labor of the same man in winter; but upon the principles contended for by the defendant's counsel, if the farmer hires in the autumn for twelve months at monthly wages, the laborer may quit his employ on the first of May, and sue for his wages and recover them, leaving the farmer the poor resort of a suit for damages. The rule contended for holds out temptations to men to violate their contracts. The stipulation of monthly pay,

or in this case to pay by the run, does not disjoin the contract; it is adopted as the means only of ascertaining the compensation, and does not render it less entire. The case from 1 Roll. Abr. 29, 1, 86, is a very bald case; and the case decided by Hale at Norfolk in 1662, 1 Com. Dig. Action, F, is a very unreasonable decision. The contract was to deliver so much corn, before Michaelmas, for so much the coomb; and a part only was delivered; and he ruled that *assumpsit* lay for so much after Michaelmas; for, though the agreement was entire, the several delivery makes several contracts. When part of the corn was delivered, towards the fulfillment of an entire contract, and for the convenience of the party delivering, it is extraordinary that such delivery should have annulled the contract; but it did not; for the case adds: "and the defendant has a remedy for the residue." This could not be, unless the contract remained unaffected by the several delivery. These are cases decided before the courts adopted the true method of considering contracts, in relation to their dependency or independency.

The entry in the plaintiff's books proves nothing; for certainly they were to keep an account of the quantity spun, and if, for the defendant's accommodation, they were willing to advance cash to him, that did not vary the contract, or show that they considered themselves liable to pay before the end of the term.

Judgment reversed.

This case is particularly noticed as holding that where a hiring or a service is for a certain definite time, to do some work at an agreed rate per piece, or per day, month, etc., the contract must be performed for the entire time, before any right arises to recover for services. See, on this point, following the authority of the case, *Stark v. Parker*, 2 Pick. 274; *Peck v. Burr*, 10 N.Y. 297; *Smith v. Brady*, 17 Id. 185; *Wolfe v. Howes*, 20 Id. 200; *Tipton v. Feitner*, Id. 429; *Cunningham v. Jones*, Id. 487. In the last case it is held that full performance is a condition precedent to the right of any payment on a contract to erect a house without any agreement in respect to the sum to be paid, or the times of payment, except that the labor was to be "by day's work." The principle of the decisions is well stated in *Tipton v. Feitner*, where it is said: "There is another class arising out of contracts for services, where the party employed agreed to serve for a fixed period, or to execute a particular work, and was to be paid by the week, or month, or by some rule adjusted by reference to the separate parcels of the work performed, in which it has been uniformly held—except in one case, where the default was occasioned by the death of the party employed—that the whole of the service must be performed in order to warrant a recovery for any part: *McMillan v. Vanderlip*, 12 Johns. 165; *Cunningham v. Morrell*, 10 Id. 203 [6 Am. Dec. 332]; *Jennings v. Camp*, 13 Johns. 94, *post*; *Reed v. Moor*, 19 Id. 337; *Lantry v. Parks*, 8 Cow. 63; *Morrell v. Burns*, 4 Denio, 121; *Wolf v. Howes*, 20 N. Y. 197."

VAN VECHTEN v. PADDOCK.

[12 JOHNSON, 172.]

PROCESS CANNOT BE ISSUED ON SUNDAY.—Process in a civil suit can neither be executed nor issued on a Sunday. Accordingly, where a prisoner went beyond the liberties on a Sunday, and the plaintiff, before he returned, on the same day filled up a *capias* against the sheriff in an action for the escape, and delivered it to the coroner, it was held not to be such a commencement of a suit as would prevent his pleading a voluntary return before suit brought.

ACTION of debt for an escape from the gaol liberties. The defendant pleaded *nil debet*, and subjoined to his plea a notice that he would give in evidence a voluntary return of the prisoner. It appeared that the prisoner escaped and went beyond the liberties on Sunday, and went to Sackett's Harbor, and on the same day, while he was at that place, and without the liberties, a *capias* was made out and delivered to a coroner of the county to be served before he returned into the liberties, which he afterwards did on the same day, before the *capias* was actually served on the defendant, and before midnight. It was agreed that if the court should be of opinion that the plaintiff was entitled to recover, a judgment should be entered, with a stay of execution; but if the court should be of opinion that the plaintiff was not entitled to recover, then a judgment of non-suit should be entered.

Van Vechten, for plaintiff.

Sterling and Williams, contra.

By Court, THOMPSON, C. J. The only question in this case is whether this suit was duly and legally commenced, so as to preclude the sheriff from pleading a voluntary return. The statute (2 N. R. L. 194) prohibiting the service of process on Sunday, does not literally extend to this case. Nor was it necessary that it should; for according to my understanding of the law on the subject, no process can be legally issued on Sunday. The same principles of policy, as well as of religion and morality, would interdict the issuing as well as the service of process on Sunday. And had not the common law made it illegal, it is most likely that the statute would have also extended to this case. It is a maxim of the law that Sunday is *dies non juridicus*. And usage and the history of law show that courts cannot sit on Sunday. In *McKally's case*, 9 Coke, 68, a distinction was taken between judicial and ministerial acts. The

former, it was said, could not, though the latter might be performed on Sunday. This case, however, was decided before the statute 29 Car. I., which made void the service of process on Sunday. In *Beclos v. Alpe*, Sir Wm. Jones, 126, it was said by the court that Sunday was not a *dies juridicus* for the awarding of any judicial process, nor for entering any judgment of record. And the awarding of process and the giving of judgment are judicial acts, and therefore cannot be supposed to be done but whilst the court is actually sitting: 3 Burr. 1600. Hence it is that a writ tested on Sunday is considered void.

In the case of *Taylor v. Phillips*, 3 East, 156, Lord Ellenborough said, the statute, 29 Car. I., was founded on public policy, and the regularity or irregularity of the proceedings contrary to it, could not depend on the assent of the party, or be waived by him. And if considerations of policy are to be taken into view, they will apply with equal force to the issuing of process. For this may, and indeed, in judgment of law must necessarily impose upon the officers of the court the duty of keeping their offices open on Sunday. The clerk, if called upon, would be bound to issue the process, and the coroner bound to receive it. For if it is the right of a party to issue process, it is the duty of the officers of the court to lend him their aid if necessary. If it depends on the will and pleasure of these officers, whether they will lend their aid or not, parties may not be placed on the same footing with respect to their remedy against a sheriff, in cases like this. Although it has been repeatedly said by this court that the issuing of the writ is, to every material purpose, the commencement of a suit: 3 Johns. Cas. 146; 1 Cai. 71, yet this must be understood as applicable to cases where the writ might be executed or some efficient act done under it, which could not have been done here, as it is not pretended that it could have been served on Sunday. The court are therefore of opinion, that there was not such a commencement of a suit against the sheriff as to deprive him of the defense set up of a voluntary return of the prisoner.

A judgment of nonsuit must be entered, according to the stipulation in the case.

TUCKER v. WOODS.

[12 JOHNSON, 190.]

MUTUALITY OF CONTRACT.—Where the promise of one party is the consideration of the promise of the other, the promises must be concurrent and obligatory on both parties at the same time. So, where one in writing declares he will sell to another a house at a certain price, this is a mere proposition, and not a contract.

CONTRACT FOR SALE OF LAND—INCUMBRANCE.—If, at the time of a contract for the sale of land, there is a lease outstanding, unknown to the vendee, the latter may rescind, as the vendor is not in a situation to give a perfect title.

ACTION OF ASSUMPSIT. The plaintiff gave in evidence the following memorandum: "I will sell my dwelling-house, tan-works, and all the buildings belonging thereto, for five thousand dollars, payable as follows: one thousand dollars on taking possession, and one thousand dollars annually thereafter, until the whole is paid; secured by bond and mortgage, or other good security, until the whole is paid; and will give possession of the house and part of the tan-works on the first of October next; or I will take of Mr. David Tucker, of Whiteborough, all his landed property, consisting of nine acres of land lying on both sides of the road near Whitman's Mills, in Whiteborough, with all the builings and appendages in good order, for four thousand five hundred dollars towards my said works, and have the possession of his when he takes possession of mine, and pays me, or secures it on interest for one year, the five hundred dollars for odds. This proposition shall be binding on me until the first day of January next. Greenbush, October 13, 1807. John W. Woods." The plaintiff proved an offer to convey the land to the defendant, and to secure to him the five hundred dollars difference; but it did not appear that he tendered a deed therefor, or that he had a deed ready. He further proved that defendant refused to fulfill his part of the engagement, saying that he had changed his mind—not objecting on account of incumbrances on the land.

Motion for nonsuit by defendant, on ground that the writing was merely a proposition and not a contract, overruled. The defendant then proved that at the time the offer to convey was made, the land of the plaintiff was leased for a term which had not expired.

The judge charged the jury that if an unexpired lease existed on the plaintiff's property, the plaintiff, not being able to

convey, they ought to find for the defendant, which they accordingly did.

Kirkland, for the plaintiff cited 2 Ves. jun. 440; 2 Cai. 117; 3 Johns. Cas. 62; 3 Johns. 210; 7 Ves. jun. 357; 5 Vin. Ab. 527.

N. Williams, contra.

By COURT. It might well be questioned, whether the memorandum, which is set up as the contract between these parties, and upon which this action is founded, is not void for want of consideration. It would seem to be a mere proposition on the part of the defendant, and without mutuality. Nothing was to be done by the plaintiff; it was optional with him whether he would comply or not, on his part, and the defendant derived no benefit or advantage whatever from the proposition. The case of *Cook v. Oxley*, 3 T. R. 653, is very much in point to show the contract void. In contracts where the promise of the one party is the consideration for the promise of the other, promises must be concurrent and obligatory upon both at the same time: 1 Chitty, 297; 1 Caines, 594. But the ground upon which the judge, at the trial, put the cause, is perfectly conclusive. For, admitting there was a consideration, and that the plaintiff was bound on his part, yet, it appearing by the evidence that he was not in a situation to perform, the contract might be rescinded by the other side: 2 Com. Con. 52, 58, 59. The proof in the case shows conclusively, that the property to be conveyed by the plaintiff to the defendant was under lease, and that the term would not expire until long after the bargain between these parties was to have been consummated; and this brings it within the principle decided by this court in the case of *Judson v. Wass*, 11 Johns. 525 [6 Am. Dec. 392].

The motion for a new trial must therefore be denied.

In *Keep v. Goodrich*, 12 Johns. 397, the court re-affirmed the doctrine of this case, that to constitute a valid contract there must be mutual obligations upon both at the same time.

PORTER v. ROSE.

[12 JOHNSON, 209.]

AVERTMENT OF READINESS TO RECEIVE.—In an action on a breach of agreement to deliver goods, where the defendant agreed to deliver to the plaintiff or his agent at a certain place, payment to be made on delivery, it is sufficient to aver that the plaintiff has at all times been ready to receive the goods and pay for the same at the place stated, without saying he was to pay at the particular time stipulated for the delivery.

AVERTMENT OF READINESS TO PAY.—Where two acts are to be done at the same time, as where one agrees to sell and deliver, and the other to receive and pay, in an action for the non-delivery it is necessary for the plaintiff to aver and prove a readiness to pay on his part, whether the other party was at the place ready to deliver or not.

ASSUMPSIT. The declaration contained two counts on a special agreement, and the usual money counts. The first count stated that the plaintiff on the twelfth of November, 1812, at Canandarqua, at the special instance of the defendant, agreed to buy of him, and the defendant then and there sold to the plaintiff six thousand gallons of whisky, at the price of seventy cents per gallon, to be delivered by the defendant to the plaintiff or his agent at Buffalo, in manner following, that is to say, one thousand gallons in each month, beginning the fifteenth November, 1813, and to be paid for by the plaintiff to the defendant on the delivery thereof as aforesaid; and in consideration thereof the plaintiff had agreed to accept, etc. The plaintiff alleged his readiness and willingness to accept the said whisky at Buffalo. At the trial the plaintiff proved and read in evidence the special agreement, and also proved the price of whisky at Buffalo at the several times when the same ought to have been delivered. The defendant proved the delivery of two thousand four hundred and ninety-five gallons at sundry times between the twelfth December and the twenty-eighth January, which was admitted to be all that had been delivered under the contract. His counsel moved for a nonsuit, on the ground that the undertakings were dependent, and the plaintiff was bound to show a readiness to pay; but the court overruled the motion, and decided that the plaintiff was not bound to show either an actual payment or readiness to pay on his part. The defendant's counsel then offered to prove that after the defendant had delivered the said whisky to the plaintiff's agent at Buffalo, and which had been accepted by the plaintiff, he presented the receipts therefor to the plaintiff's agent at Canandarqua, who usually transacted the business, and who had the contract, and demanded payment, which was refused by the agent for want of funds; that apprehensions were generally entertained of the solvency of the plaintiff at this time, and that defendant offered to proceed and perform the residue of his contract by a delivery of the remainder of the whisky if he could be paid for what had been already delivered; but this evidence was overruled, and the jury found a verdict for the plaintiff. A motion was made in arrest of judgment and also for a new trial.

Spencer, for defendant.

Bleeker, contra.

By Court, SPENCER, J. On the trial, the defendant's counsel moved for a nonsuit, on the ground that the undertakings were dependent, and that the plaintiff was bound to show a readiness to pay. The judge overruled this objection, deciding that the plaintiff was not bound to show either a readiness to pay, or the actual payment for what had been delivered.

The defendant has moved in arrest of judgment, and for a new trial. In both counts of the declaration, it is stated that the whisky was to be delivered at Buffalo, and it is averred in both counts that the plaintiff hath, at all times, been ready and willing to receive the said whisky, and to pay for the same at the rate and price aforesaid, to wit, at Buffalo aforesaid. And although it is not averred that the plaintiff was ready, etc., at the time stipulated for the delivery, the declaration conforms to the precedent: 2 Chitty, 99. An averment that he was at all times ready, necessarily relates to the time of delivery. There is no averment that the defendant did not present the receipts, and that the plaintiff was ready to pay on their presentation. This was not necessary, because *non-constat* that receipts were given, and it was unnecessary to give them when the delivery was to the principal himself. Consequently, the motion in arrest of judgment cannot be sustained.

As to the motion for a new trial, it is fully settled in a variety of modern cases which have disregarded the artificial and subtle distinctions of former times, and looked to the real intention and meaning of the parties, that where two acts are to be done at the same time, as when the one agrees to sell and deliver, and the other agrees to receive and pay, an averment by the purchaser, in case he sues for the non-delivery, of a readiness and willingness to pay is indispensably necessary; and that consequently the readiness and willingness to pay is matter to be proved on his part, whether the other party was at the place, ready to deliver the thing contracted for or not: *Morton v. Lamb*, 7 T. R. 125; *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 Bos. & P. 447; 1 Saund. 320, n. 4; *West v. Emmons*, 5 Johns. 179; *Green v. Reynolds*, 2 Johns. 207.

It is impossible to distinguish this case from those cited, but on the ground that this contract provides for the delivery of the whisky at Buffalo, to the plaintiff, his agent, clerk, or issuing commissary, and obliges the plaintiff to pay for the whisky, on

the production of receipts. From these stipulations it might have been contended, in case of a delivery of the whisky to the plaintiff's agent, etc., that the payment on the delivery was dispensed with. The averments in the declaration preclude the plaintiff from taking this ground; he has averred a readiness and willingness to pay for the whisky at Buffalo, and cannot, contrary to the averment, set up that he was not at Buffalo, or excuse himself from a readiness and willingness to pay there. The provision relative to a payment on the production of receipts, extends only to a delivery to the plaintiff's agent; for it would be absurd to require a receipt from the plaintiff himself, as evidence of the delivery to himself. Under the averments in the declaration, we are to intend that the plaintiff was at Buffalo at the times specified for the delivery, and that he was then and there ready and willing to receive and pay. His ability and readiness to pay became, then, a matter which he was bound to prove, whether the defendant was then ready to deliver or not.

Motion for a new trial granted; the costs to abide the event of the suit.

This case is relied on in *Isaacs v. New York Plaster Works*, 67 N. Y. 125, showing where a party is bound to aver and prove a readiness to receive and pay for goods to be delivered.

BETTS v. BADGER.

[12 JOHNSON, 228.]

DEED IN EVIDENCE.—A deed produced at a trial, pursuant to notice from the opposite party, is *prima facie* to be taken as duly executed, and may be read in evidence without proof of its execution.

ERROR from the common pleas. The action was brought by Badger against Betts, the declaration being on a certain note or instrument in writing, wherein the defendant promised to pay to the plaintiff fifty dollars, in good napped hats, to be delivered to the defendant. The note had the following condition: That if the defendant should not procure a deed from one Lewis of a farm on which the plaintiff lived, the said note was to be null and void, otherwise to remain valid. The plaintiff averred that the defendant did procure the deed, yet the defendant, though often requested, had not paid. At the trial the deed of Lewis was produced by the defendant, pursuant to notice from

the plaintiff, and the counsel for the plaintiff offered to read it in evidence without any proof, by the subscribing witness, of its execution. The defendant's counsel objected, insisting that it was inadmissible without proof of execution. The court below were divided in opinion upon the question, and the deed was read in evidence, without any proof of its execution. A verdict was found for the plaintiff. A writ of error was thereupon taken.

Vanderpool, for plaintiff.

Bleecker, *contra*.

By Court, SPENCER, J. The question presented by the bill of exceptions is, whether a deed in the possession of one of the parties, and produced by him at the trial, upon notice given, and at the requisition of the other party, can be read in evidence by the party thus calling for its production, without proof of its execution, there being a subscribing witness to the execution. The bill does not state, nor can it be collected, with certainty, from the note declared on, whether the deed was given to Betts or Badger, or some other person. I think, however, it may be inferred, from several circumstances, that the deed was given by Lewis to the plaintiff in error: 1. Because he had possession of it; and, 2. From the condition of the note; that if the plaintiff in error did not produce a deed from Lewis for the farm on which the defendant lived, then the note was to be null and void; if he did, then he was to pay the note. This imports that he was to gain an advantage and to derive a benefit from the deed.

In *Passel v. Godsall*, 2 T. R. 44, the plaintiff had given the defendant notice to produce an agreement at the trial. It was produced, and the objection was taken that it could not be read without proof. Lord Mansfield overruled the objection, saying, the defendant produced it as the original agreement, and therefore it need not be proved. Lord Mansfield expressed the same opinion in *Thompson v. Jones*, Id. In the case of *The King v. The Inhabitants of Middlesoy*, Id., Ashurst, Buller and Grose, JJ., all agreed that an instrument produced by one party, at the cost of the other, must be presumed *prima facie* to be duly executed. In *Doxon v. Haigh*, 1 Esp. 409, Lord Kenyon expressed the same opinion; and Peake in his treatise on evidence, considers that to be the rule, when the deed is given to the party who produces it; but when it is matter *inter alios acta*, and the party called on to produce it is not a party to the

instrument, he expresses doubts whether it be not necessary to prove it. In *Gordon v. Secretan*, 8 East, Lord Ellenborough held that it was necessary, when there was a subscribing witness, for the party to prove the execution, although the instrument was produced by the other party, and although purporting to be executed by him; and Lawrence, J., in the same case, said it had been so ruled by Lord Kenyon in the case of a will. But in a subsequent case, *Wetherston v. Edgington*, 2 Camp. 94, Heath, J., declared he thought the old rule the sensible one, that an instrument coming from the opposite side was, *prima facie*, to be taken as duly executed.

These are believed to be all the cases on the subject. I apprehend the practice at *nisi prius*, with us, has been in conformity with what Mr. J. Heath calls the old rule; if the party producing an instrument is one of the parties to it, the custody of the paper affords high presumptive evidence that he holds it as a muniment; and *prima facie*, it is sufficient proof of the execution.

Judgment affirmed.

ROBERTS v. TURNER.

[12 JOHNSON, 222.]

WHO COMMON CARRIER.—A person who receives and forwards goods, taking upon himself for a compensation all the expenses of transportation, but who has no interest or control in the vessel by which they are forwarded, cannot be held liable as a common carrier.

ACTION on the case against the defendant as a common carrier. The defendant resided at Utica and pursued the business of forwarding merchandise and produce from that place to Schenectady and Albany. It was customary to receive the merchandise in his store and send it by the boatmen on the Mohawk or by wagons to the places named, for which he was paid a certain rate per barrel; his compensation consisting in the difference between the sum which he is obliged to pay for transportation and that received from the owners of the goods. The defendant received certain goods of the plaintiff in this way and forwarded them by boat to Schenectady, but while proceeding down the river the boat met with an accident by which the goods were lost. The defendant had no interest in the freight of the goods, nor was he concerned as owner in the boats.

The court being of opinion that the defendant was not to be considered a common carrier, nonsuited the plaintiff, and a motion was now made to set aside the nonsuit.

N. Williams, for plaintiff.

Henry, contra.

SPENCER, J. On the fullest reflection, I perceive no grounds for changing the opinion expressed at the circuit. The defendant is in no sense a common carrier either from the nature of his business or any community of interest with the carrier. Aldrich, who, as the agent of the plaintiff, delivered the ashes in question to the defendant, states the defendant to be a forwarder of merchandise and produce from Utica to Schenectady and Albany, and that he delivered the ashes with instructions from the plaintiff to send them to Col. Trotter.

The case of a carrier stands upon peculiar grounds. He is held responsible as an insurer of the goods, to prevent combinations, chicanery and fraud. To extend this rigorous law to persons standing in the defendant's situation, it seems to me, would be unjust and unreasonable. The plaintiff knew, or might have known, for his agent knew, that the defendant had no interest in the freight of the goods; owned no part of the boats employed in the carriage of the goods, and that his only business in relation to the carriage of goods consisted in forwarding them. That a person thus circumstanced should be deemed an insurer of goods forwarded by him, and insurer, too, without reward, would, in my judgment, be not only without a precedent, but against all legal principles. Lord Kenyon, in treating of the liability of a carrier, 5 T. R. 394, makes this the criterion to determine his character, whether at the time when the accident happened the goods were in the custody of the defendants as common carriers. In *Garside v. The Trent and Mersey Navigation*, 4 T. R. 581, the defendants, who were common carriers, undertook to carry goods from Stoneport to Manchester, and from thence to be forwarded to Stockport. The goods arrived at Manchester and were put into the defendants' warehouse and burned up before an opportunity arrived to forward them. Lord Kenyon held the defendants' character of carriers ceased when the goods were put into the warehouse. This case is an authority for saying that the responsibilities of a common carrier and forwarder of goods rest on very different principles. In the present case, the defendant performed his whole undertaking; he gave the ashes in charge to an experienced and faithful boatman.

It has been urged that the defendant derived a benefit from the carriage of the goods, in receiving cash from the owners of

produce, and paying the boatman in goods, and also in charging more than he actually paid. The latter suggestion is doubted in point of fact; but admitting the facts to be so, these are advantages derived from the defendant's situation, as a warehouse-keeper and forwarder of goods, and by no means implicate him as a carrier; for surely the defendant is entitled to some remuneration for the trouble in storing and forwarding goods. In any and every point of view there is not the least pretext for charging the defendant with this loss as a common carrier.

By Court. Motion denied.

In Angell on Carriers, sec. 75, we have a clear exposition of the doctrine contained in this case. The author says: "There is a class of persons well known in this country who are called 'forwarding merchants,' and who usually combine in their business the double character of warehousemen and agents for a compensation to forward goods to their destination. This class of persons is especially employed upon our canals and railroads, and in our coasting navigation by steam vessels and other packets. The law is that persons so employed, if they have no concern in the vehicle by which the goods are sent, and have no interest in the freight, are not liable as common carriers, but are of course liable like warehousemen and common agents, that is for ordinary diligence, and for that only."

In a note to 2 Parsons on Contracts, 139, this case is referred to as an important one on the liability of forwarding merchants. The author again (p. 178) refers to the case as being distinguished in *Teal v. Sears*, 9 Barb. 317. In this case the court very clearly stated the principles on which the decision in the principal case rests. It is there said: "We are referred to *Roberts v. Turner*, 12 Johns. 232, as controlling this case. That case was decided in 1815. But without referring to the actual condition of the business of the country since that decision, the case is distinguishable from the present. In that the whole facts showed that Turner acted but as a forwarder of the goods. He kept a store at Utica, where produce was left by the public to be forwarded by boats or wagons to Albany. He had no interest in the boats or wagons. The plaintiff knew when his ashes were left to be sent to Albany, that Turner's only business in relation to the carriage of goods consisted in forwarding them. This was also understood by the public; and that without any concern in the vessels by which the goods were forwarded, or any interest in the freight, they were stored with him merely for the purpose of forwarding by others; he taking upon himself the expenses of transportation, for which he received a compensation from the owners of the goods. But this was not the position of the defendants in the present suit. They were in a measure engaged in the carrying business, and were interested in some extent in vessels on the canal and lakes. They kept a public office for the transaction of their business, at a place of transshipment, receiving and carrying all goods that might be directed to their care, in their own vessels when convenient, and in such other vessels as they could employ on terms most advantageous to themselves. They received the goods in question directed to them, which were destined west on the lakes. They employed a vessel to carry them forward, making out a new freight bill and returning the old one,

and for themselves taking the captain's receipt for the goods. Persons ostensibly engaged as forwarders have, in this state become numerous, and their business complicated and extensive. The rigid rules of the common law make the carrier assume the liability of an insurer of property, whilst the warehouseman and forwarder are but answerable as bailees for ordinary neglect. The law distinctly defines the business of each, and their liabilities. Whilst the warehouseman confines himself to the receipt and storage of goods for a compensation, and a forwarder to the receipt of goods, and the forwarding of them by a carrier other than himself, in good credit and in safe vessels, they only assume the liability of depositaries for hire. But if calling themselves forwarders, they so act and conduct their business as to lead the public to regard them as carriers, and to employ them as such, without intimation of their true character, the liabilities of a carrier attach to them."

On this ground, as here stated, express companies are held liable as common carriers: *Christenson v. American Ex. Co.*, 15 Minn. 270; S. C., 2 Am. Rep. 122. Here the authority of the principal case was indorsed. It appeared the defendants were engaged in transmitting from place to place goods for hire, having at different points local agents whose duty it was to receive goods transmitted and deliver the same to the consignee, as well as to receive goods for transmission, having no vehicles or other means of transportation, except at their local offices for local purposes, but transmitting goods in charge of their messengers, by various means of communication, owned and controlled by other parties. Plaintiff's agent delivered to them goods for transportation, taking a receipt, in which it was stipulated that the defendants were not to be held liable for any loss or damage except as forwarders only, nor for perils of navigation and transportation. The steamboat on which the goods were being transported, in consequence of the negligence of those in charge, ran upon a snag and was sunk, thereby injuring the goods. In an action to recover the damages, it was held that the defendants were common carriers, not forwarders, and as such liable for the loss, notwithstanding the terms of the receipt, which could not cover losses arising from negligence.

If it be proved that one common carrier has received goods from another carrier, to whom they were at first delivered by the owner for carriage, he may become liable to the owner as common carrier: *Angell on Carriers*, sec. 466; *Green v. Clarke*, 12 N. Y. 343; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 380. In a late well considered case in Mississippi, *Oxford v. Southern R. R. Association*, 51 Miss. 222, it is held that a railroad company, by simply receiving freight marked for delivery at a point beyond its lines, does not thereby contract to transport and deliver at the place of destination, and is bound only to seasonably deliver the freight to its connecting line on the usual route to the point of destination: See on this point 2 Redfield on Railways, sec. 180; *Gray v. Jackson*, 51 N. H. 9; *Root v. G. W. Railway Co.*, 45 N. Y. 524.

The civil code of California, sec. 2201, 2202, provides: "If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery."

"If freight addressed to a place beyond the usual route of the common carrier who first received it is lost or injured, he must, within a reasonable

time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor." This last provision is intended to save the consignor from the risk of mistaking his action, by obliging the carrier to furnish proof that another is liable, the fair presumption being against him if he does not.

JACKSON v. WOOD.

[12 JOHNSON, 212.]

WHEN MORTGAGE PRESUMED SATISFIED.—Where the mortgagee has never entered into possession, and no demand has been made or interest paid for twenty years, the mortgage will be presumed to have been satisfied. Any evidence offered to repel this presumption must be clear and explicit.

EJECTMENT. The premises were mortgaged by one Ellis to John Munro, April 18, 1775, for the payment of sixty pounds, with annual interest, commencing April 18, 1776. It did not appear that the mortgage had ever been acknowledged or registered. Munro was attainted, and judgment of attainder was signed, July 14, 1788. The mortgage, and exemplification of the judgment were produced and proved, on the part of the plaintiff. A witness for the plaintiff testified that he knew the premises for thirty years past, that Ellis was succeeded in possession by one Dobbs, who was succeeded by a Dr. Hill, and so by various parties, until one Cornell, who sold to defendant, acquired the property at public sale. The plaintiff produced witnesses, to rebut the presumption of payment arising from the lapse of time. One Trull testified that he purchased the premises in April, 1776, when he well understood there was a mortgage thereon, and when he sold, he informed his grantee of this mortgage, that he was present when Cornell sold to the defendant, and that he believed the mortgage was then referred to. One Rice testified that he had known the premises twenty-six or twenty-seven years, when Hill was in possession, and that the latter sold to Brown; that he had known all the persons since in possession, and had heard them all acknowledge the existence of the mortgage, and that it was unpaid. On being cross-examined, as to which of the owners he had heard make such acknowledgment, he said every one, except Brown, and on further examination, he said the occupants told him, that only forty acres were mortgaged, and that the sum was forty pounds.

The defendant gave in evidence a deed of the premises from Brown to Perine, dated February, 1782, and deeds from the various parties in possession, and lastly a deed from the sheriff

conveying the title to Cornell, and a deed to him from the latter. All the deeds, except the sheriff's, contained covenants of warranty, but no mention was made of the mortgage in either of them.

The jury were charged, that by the attainder of Munro, the people had become vested with his rights, and, therefore, might bring an action on the mortgage given to him; but the plaintiff was not entitled to recover, inasmuch as the mortgage had not been recorded, and sufficient notice of its existence had not been brought home to the defendant, or those claiming under him, and the jury had a right to apply the presumption of law, that the mortgage had been paid, when it stood more than twenty years, and when there was not sufficient evidence to repel this presumption. A verdict was found for the defendant.

A motion was made to set aside the verdict, and for a new trial.

Van Vechten and Wendall, for plaintiff.

Orary, contra.

By COURT. The lessors of the plaintiff claim title to the premises in question, under a mortgage, bearing date the eighteenth of April, 1775, given by Daniel Ellis to John Munro for sixty pounds. The attainder and conviction of Munro, and the execution of the mortgage were duly proved; and the only question upon the trial was, whether the evidence offered was sufficient to rebut the presumption of payment, arising from the lapse of time. There was no witness who spoke of any acknowledgment of the several owners of the land, that there was any mortgage upon it, which was in force and unpaid, except Asa Rice; and he does not identify the mortgage now in question. The one he heard spoken of was for forty pounds; and upon forty, instead of one hundred acres of land. And he, too, contradicted himself, first saying, he had heard all the owners acknowledge the mortgage, and afterwards admitting that he had never heard Brown make any such acknowledgment. And, besides, his knowledge of the lot seemed to be imperfect and recent, when compared with the date of the mortgage. Under such circumstances, the jury might well question the accuracy of his memory. The acknowledgments spoken of by all the other witnesses were in reference to mere vague rumors, and by no means recognizing this as a valid subsisting mortgage, for which the owners of the land held themselves responsible. And their conduct shows that they did not consider it in this light. For

in the numerous sales made of the premises, no deduction in the purchase-money appears to have been made on this account; and warranty deeds were given, without any exception of the mortgage. No bond was shown, and the mortgage not having been registered no discharge upon it was absolutely necessary to invalidate it. Payment of the bond would operate as a discharge of the mortgage. The presumption of the payment and extinguishment of such an old outstanding mortgage ought to be pretty liberally indulged. Where the mortgagee has never entered into possession of the mortgaged premises, twenty years without any demand, or any interest having been paid, has always been deemed a sufficient length of time to warrant the presumption of satisfaction: 3 Johns. 386; 7 Id. 283; Bull. N. P. 110. The mortgage not having been registered, cannot be set off against subsequent *bona fide* purchasers, unless notice of the mortgage is brought home to them. What is said by the court in *Jackson v. Given*, 8 Johns. 140 [5 Am. Dec. 328], is very much in point, that mere loose conversations will not warrant the inference of notice. And Lord Hardwicke, in *Hine v. Dodd*, 2 Atk. 275, said that mere suspicion of notice was not enough to break in upon the registry act; nothing short of fraud, or clear and undoubted notice would do. The same doctrine has been recognized in other cases. Under these circumstances, the jury were fully warranted in presuming, either an extinguishment of this mortgage, or a want of due notice of its existence. The notice for a new trial must accordingly be denied.

Motion denied.

RAYMOND v. BEARNARD.

[13 JOHNSON, 374.]

RECOVERY OF MONEY PAID, ON RESCISSION OF CONTRACT.—If the defendant chooses to rescind an agreement, the plaintiff may, under a count for money had and received, recover back money paid by him on account of the agreement; and a demand of the money before bringing the action is unnecessary. A tender of such money will not defeat the action, but will merely extinguish a claim for interest.

ERROR from the common pleas. The plaintiff below brought an action of *assumpsit* against Raymond and others, who were partners, for the non-delivery of twelve barrels of whisky, sold by them to plaintiff. The first count of the declaration stated that on September 7, 1813, the plaintiff made a contract with the defendants for the sale of twelve barrels of whisky, at the

rate of twenty-two dollars a barrel, to be delivered to the plaintiff at defendants' store, within a reasonable time thereafter; that he paid one hundred dollars, part of the consideration money; but although he was ready to receive the whisky and pay the money, the defendants failed to deliver. The second count stated the sale of the whisky, as in the first count, to be delivered when the plaintiff could conveniently procure teams for the transportation thereof, which was at the end of the plowing season, and that the plaintiff did accordingly procure teams, but the defendants failed to deliver. The third count was for money had and received.

The defendants pleaded the general issue; and it was proved by two witnesses for the plaintiff, at the trial, that at the time the whisky was sold, it was proposed the plaintiff should call for it, at the store of the defendants, within one month; but this meeting with an objection on the part of the plaintiff, the defendants consented to extend the time five or six days, to which the plaintiff said, he would take it away, if possible. The plaintiff then advanced one hundred dollars, in part payment. But one of the witnesses believed the agreement was to pay the residue of the money and take away the whisky, within one month or thereabouts. It was shown that the plaintiff called in about three months and tendered the residue of the money, and demanded the property, which the defendants refused, on the ground that the plaintiff had broken his contract by not calling in time, and they offered to return the one hundred dollars. Upon this evidence, the counsel for the defendants contended that the plaintiff was entitled to recover, neither on the special counts nor on the count for money had and received; but the court charged the jury, that although the contract was not proved as laid, yet the plaintiff was entitled to recover the one hundred dollars, under the money count, and the jury found accordingly.

The case was submitted without argument.

By Court. This case comes before the court on a writ of error to the common pleas of Orange county, and the errors complained of arise out of a bill of exceptions tendered at the trial. The declaration contains several counts on a special contract, and also the common money counts. Upon the trial, the plaintiff below failed, in the opinion of the court, in supporting the special contract, but they allowed him to recover back the money advanced at the time the contract was made. The ground upon which the plaintiff failed in recovering on the spe-

cial contract was, that he did not call for the delivery of the whisky within the time limited by the contract, and when he did call and demand the same, the defendants refused to deliver it, because the demand was not made in season. Thus the defendants, by their own act, defeated a performance of the contract. There is therefore no special agreement subsisting between the parties, but the same has been put an end to by the election of the defendants. If the special agreement was still in force, the plaintiff could not resort to the general counts. But the defendants themselves refusing to carry into effect the contract, they ought not to be permitted to set it up as the pretext for holding the money advanced. If the contract is rescinded in part, it must be *in toto*, and the plaintiff's right to recover back the money paid is undeniable: 1 T. R. 183; 1 Bos. & P. (N. S.) 353; 5 Johns. 87 [4 Am. Dec. 329]; 7 Johns. 132. No demand of the money was necessary before bringing the action, nor did the tender set up extinguish the demand; the only effect of such tender is to preclude any claim for interest. The judgment of the court below must accordingly be affirmed.

Judgment affirmed.

WESTON v. BARKER.

[12 JOHNSON, 276.]

WHEN ONE BOUND BY TRUST IN FAVOR OF ANOTHER.—A party assigned certain securities in trust to another to satisfy a certain indebtedness, and to hold the balance subject to his order, which trust was accordingly accepted. The assignor afterwards directed the balance of the money received under the assignment to be paid over to a third party. It was held that this party could maintain an action for money had and received against the person holding the money; for the acceptance of the trust was equivalent to an express promise to the person who should be ordered to receive the money.

ASSUMPT. Bowen & Robins, partners for the purpose of securing certain debts, on the fourth of March, 1811, assigned two policies to the defendant, made by the New York Insurance Co., on a vessel and cargo. At the time of assignment, they addressed a letter to the defendant, informing him of the assignment, stating that one half the amount was in trust to discharge certain of their obligations named, and the balance was to remain subject to their order. On the back of a copy of this letter, the defendant made and subscribed the following indorsement: "I acknowledge to have received from Bowen &

Robins the original letter, of which the within is a copy, the conditions named in which I engage to comply with. New York, March 4, 1811."

Bowen & Robins being indebted to the plaintiff in a larger sum than the amount of the fund in the hands of the defendant, which remained unappropriated, after drawing on him for about ninety-one dollars in favor of a third person, indorsed on the above-mentioned copy an order in favor of the plaintiff as follows: "New York, March 15, 1811. Sir: For value received we hereby request you will account with Abijah Weston, of this city, for the amount recovered of the New York Insurance Co., on policies assigned you for our account, first providing for assumptions made by us to amount of one thousand and seventy-five dollars, as per account annexed," which was delivered with the defendant's indorsement, as above stated, to the plaintiff, the defendant receiving notice a day or two thereafter. The defendant, from the amount received on the policies, deducted the amount due from Bowen & Robins, and a balance remained in his hands of six hundred and forty-seven dollars and thirty-eight cents, which, with the interest thereon, was the amount claimed by the plaintiff.

The defendant offered in evidence, as a set-off, a note drawn by Bowen & Robins in favor of Mason & Wilcox, for two thousand three hundred dollars, dated January 8, 1811, payable four months after date, which was received by the defendant from Bowen & Robins, for goods sold to them by the plaintiff; which note was protested for non-payment on the eleventh May, 1811. A verdict was found for the plaintiff for eight hundred dollars, subject to the opinion of the court.

Warner & Radcliff, for plaintiff.

Wells, for defendant.

By Court, THOMPSON, C. J. The ~~principal~~ question in this case is, whether an action for money had and received, can be sustained by the present plaintiff. It was not denied on the argument by the defendant's counsel but that the action would be supported if an express promise to pay was proved; and, indeed, this principle is too well settled to be questioned. It has been repeatedly recognized in this court: 7 Johns. 103; 8 Johns. 149. It appears to me that the proof in this case establishes such a promise, according to the good sense and sound interpretation of the rule. That the defendant has actually received the money is admitted, and the plaintiff's claim to it is

supported by the strongest principles of justice and equity, as will appear from a bare statement of the case.

Bowen & Robins, on the fourth of March, 1811, assigned to the defendant two policies of insurance, in trust, to discharge certain specified debts, and the balance to be held subject to their order. The defendant, on the same day, signified, in writing, his acceptance of the trust, and expressly engaged to comply with the conditions mentioned in the letter which declared the trust, viz., to pay the specified debts, and hold the balance subject to the order of Bowen & Robins. On the fifteenth of the same month, Bowen & Robins being indebted to the plaintiff, gave him an order on the defendant for such balance, of which notice was about the same time given to the defendant. The defendant afterwards received the amount due on the policies, and after paying the demands specified in the declaration of trust, held in his hands a balance of six hundred and forty-seven dollars and thirty-eight cents, which is the sum, together with the interest, for which this suit is brought. This brief statement of facts would seem sufficient to show the plaintiff's right to recover. The money has, in fact, been received by the defendant; and, according to the very terms of his engagement, was received as the money of the plaintiff, and not of Bowen & Robins; they having previously directed the same to be paid to the plaintiff. If A. deliver money to B., to be paid over to C., the latter may recover it of B. in an action for money had and received: 1 Bos. & P. 296. It is immaterial, in the case before us, whether the money was actually paid by Bowen & Robins to the defendant, or whether it came into his hands from any other quarter by their order. When it was received it was received as the money of the plaintiff; and so, in the most strict and literal sense, it was money received to the plaintiff's use. It was considered on the argument that had the plaintiff been named in the declaration of trust as one of the persons to be paid out of the moneys received on the policies, he could maintain this action. And where in good sense and sound principle can be the difference whether he was originally named or afterwards designated, according to the terms of the defendant's undertaking? His express promise was to hold the balance, subject to the order of Bowen & Robins. As soon as such order was given, this promise attached and enured to the benefit of the person named in such order. It is undoubtedly a well settled rule of the common law, that *chooses in action* are not assignable; and, therefore, when a per-

son entitled to money due from another assigns over his interest in it to a third person, the mere act of assignment does not entitle the assignee to maintain an action for it; but if there be an assent or promise on the part of the debtor or holder of the money, the action for money had and received has been holden to lie.

What will amount to such assent or promise, so as to make the holder of the money liable, will be better seen by a reference to some of the adjudged cases on this subject. In *Ward v. Evans*, 2 Ld. Raym. 298, one Fellows, having money in his hands of the defendant, gave a verbal order to pay a certain sum to the plaintiff, and to indorse it upon a note, which he, Fellows, held against the defendant, and this indorsement was accordingly made. This was held sufficient to maintain the action for money had and received to the use of Ward, the plaintiff. Holt, C. J., said, when the money was indorsed on Fellows' bill, and Fellows directing that sum to be paid to the plaintiff, and the defendant having the money in his hands, it amounted to a receipt of so much money by the defendant to the plaintiff's use. So, also, in *Israel v. Douglass*, 1 H. Bl. 239. The defendants being indebted to one Delvalle, he drew an order on them in favor of the plaintiff, who had advanced money to Delvalle. The defendants accepted the order, and they were held responsible in an action for money had and received. Lord Loughborough, in answer to the argument, that the money was, in point of fact, owing by the defendants to Delvalle, and that their undertaking was to him, and that no money was in reality had and received by them to the use of the plaintiff, says, the debt, with the consent of the parties, was assigned to the plaintiff, of which the defendants had notice, and assented to it; by which assent they became liable to the plaintiff for money had and received. Had the defendant, in the case before us, directly accepted the order drawn on him, it would fall precisely within the case last cited. But as I have before observed, this could in principle make no difference, for the express promise of the defendant was, in substance, to pay over the money to whomsoever Bowen & Robins should appoint to receive it. And this appointment was made certain by the subsequent designation in the order. That this was sufficient, is established by the case of *Fenner v. Meares*, 2 Bl. 1269. It was there held that *indebitatus assumpsit* for money had and received, would lie by an assignee of a *respondentia* bond, where the obligor by an indorsement thereon promised to pay the

same to such assignee as the obligor should duly appoint. Here the promise was not made to any person in particular, but generally to whomsoever the obligee should appoint. It is true that the authority of the two last cases has been questioned by later decisions in the English courts: 1 East, 104; 3 Id. 171. The reasons and principles, however, upon which they were founded, have not been shaken, but on the contrary sanctioned by this court, as will be seen by the case of *Neilson v. Blight*, 1 Johns. Cas. 205, which was an action of *assumpsit* for money had and received. From an examination of the facts in that case, it appears that there was no express promise made by the defendant to the plaintiff. Radcliff, J., after stating the leading facts in the case, observes, that there was a trust created in Raddon for the benefit of the plaintiff, which the plaintiff had a right to affirm and avail himself of, and that this trust was transferred to the defendant, who became equally responsible with Raddon, by receiving the wines on the same terms; that there was an implied *assumpsit* in law, the fund being in the defendant's hands, and received by him for the benefit of the plaintiff. He laid it down as a maxim, that where a trust is created for the benefit of a person, though without his knowledge at the time, he may affirm the trust and enforce its execution. And Kent, J., said, from these facts the law will infer a promise by the defendant to pay the money, because in justice and good faith he was bound so to do. From that case it is clear that no express promise is necessary in order to make a party responsible in this form of action. But in the case before us, I think I have shown that there was what must be deemed equivalent to an express promise, and as soon as the money came into the defendant's hands, he became bound to pay it over to the plaintiff, according to the principle which governed the decision in *McMenomy v. Ferrers*, 3 Johns. 82.

There is no ground upon which the set-off can be allowed. That is a claim against Bowen & Robins with which the plaintiff has no concern. Nor can the defendant complain of any hardship in the case for he held this note against Bowen & Robins when he accepted the trust and engaged to pay the money now in question to their order. This shows conclusively that he did not look in any manner to this fund as security, but trusted to the personal responsibility of the drawers and indorsers for payment.

The opinion of the court accordingly is, that the plaintiff is entitled to judgment.

SPENCER, J., dissented.

PLATT, J., not having heard the argument, gave no opinion.

Judgment for the plaintiff.

In *Tiernan v. Jackson*, 5 Peters, 597, Story, J., notices and distinguishes this case, saying: "But it is said that if a party agrees to hold money or goods subject to the order of the owner, it raises an implied promise to the holder of the order, upon which he may maintain an action at law. The case of *Weston v. Barker*, 12 Johns. 276, has been relied on for this purpose. But in that case the party receiving the money under the assignment made an express promise to hold the same subject, in the first place, to the demands of certain specified creditors, and next, the balance subject to the order of the assignor. The court held that in such case the holder of the order subsequently drawn had a right to the money, as money had and received to his house, notwithstanding there was a counter-claim or set-off of the assignee accruing before the assignment."

The case is followed and relied on in *McLaughlin v. Swann*, 18 How. U. S. 220.

WIGGIN v. BUSH.

[12 JOHNSON, 306.]

NOTE VOID AGAINST PUBLIC POLICY.—A note given by an insolvent debtor to a creditor, in consideration that the latter should withdraw his opposition to the debtor's obtaining his discharge, is void.

ACTION on a promissory note made by the defendant payable to one Forsaith, and by him indorsed to plaintiffs.

The general issue was pleaded, with notice of discharge under the insolvent laws. The defendant was a partner of the firm of Rice and Bush, who were indebted to the plaintiff on five promissory notes drawn by them payable to Forsaith, and by him indorsed to the plaintiffs. Forsaith had conveyed lands to the plaintiffs as security for the payment of these notes, but the lands were not sufficient for their payment. Forsaith being in New York had some conversation with defendant about his obtaining his discharge, when he stated that Forsaith had power to prevent his discharge, as he had not made a fair exhibit.

Forsaith opposed the defendant's discharge, and in order to have him withdraw his opposition, the defendant gave the plaintiffs a note for one thousand dollars. Forsaith consented to indorse the note without receiving any security from the defendant. The note, although dated on the twenty-fourth of May, was in fact made on the twenty-second of April, and a memorandum of the day upon which it was executed was indorsed upon it.

Forsaith received the note and delivered it to the plaintiffs in Boston, where they resided, on his return to that city, before the note became payable, but he did not inform them how it was obtained, and at the time, there was no understanding that he should not be liable as indorser. The defendant received his discharge under the insolvent laws, first of May, 1812.

Sedgwick, for plaintiffs, contended evidence was not admissible to show that the note was executed at a different date from that on its face: *Boehm v. Sterling*, 7 T. R. 423. The note was not given in fraud of the insolvent laws; the English cases on this subject are those of positive frauds against the other creditors in signing the bankrupt's certificate, which are distinguishable from the present case. In *Lewis v. Chase*, 1 P. Wms. 620, Lord Chancellor Parker refused to relieve against a bond given by a bankrupt to a creditor to induce him to withdraw a petition against the allowance of a discharge. In the case of *Waite v. Harper*, 2 Johns. 386, the plaintiff's demand was not inserted in the inventory; it was a case, therefore, of direct fraud against the statute.

Colden, contra.

By Court, YATES, J. The plaintiff, in this cause, was properly nonsuited. The note in question was given to prevent the opposition of Forsaith, the payee, against the insolvent's obtaining the benefit of the act of the eleventh of April, 1811, and in my opinion, under circumstances of fraud; for it is expressly stated, that the defendant, in conversation with him on the subject, admitted that he had not made a fair exhibit of his debts to the recorder. It became, therefore, a subject of inquiry whether he had committed perjury, in not rendering a just and true account, according to the oath taken by him, as prescribed by the statute under which the proceedings were conducted.

Other reasons, besides, might have been shown by Forsaith to prevent his discharge, not susceptible of detection afterwards; so that the transaction, from its very nature, must operate fraudulently, and ought not to be countenanced. Not only the policy, but the spirit of this statute, as well as every statute I have seen on this same subject, forbids such transactions. It is at all times intended by the legislature to effect an equal distribution of the insolvent's estate, and secure equal advantages to the creditors; and although the giving of this note and the payment of it afterwards by the insolvent would not, as to that amount, lessen their distributive shares in his

estate, yet the suppression of facts producing such a result, which might be the case, is alone, in my view, sufficient to prevent the recovery now sought for.

The act can never be construed so as to authorize the insolvent to silence an imposing creditor by a written promise of future payment of his debt, or by giving a reward to any person, whether agent for a creditor or not, to withdraw his opposition. It appears to me incorrect and unjust, and might be attended, in either case, with the grossest imposition on creditors. It must be admitted that laws of this description, although necessary to relieve unfortunate debtors, always operate hard on creditors; and it is the province of courts of justice, in cases like the present, to interfere, and to close the remotest avenues leading to fraud or imposition on them by persons claiming the benefit of such laws.

The case of *Cookshot v. Bennet*, 2 T. R. 768, could not have interfered with the distributive share of a creditor; yet the court decided that the note given by the bankrupt was void. In that case all the creditors of the insolvent consented to accept a composition for their respective demands, upon an assignment of his effects by a deed of trust, to which they were all parties; and one of them, before he executed the deed, obtained from the insolvent a promissory note for the residue of his demand, by refusing to execute the deed until such note was made. The note was declared void in law, as a fraud on the rest of the creditors; and the court decided that a subsequent promise to pay it was a promise without consideration, which would not maintain an action.

In *Payne v. Eden*, 3 Caines, 213, it was necessary for the insolvent to obtain the assent of a certain portion of his creditors; and he had a sufficient number without the payee of the note; but the note having been given in consideration of his signing the insolvent's petition, it was adjudged void. If the security in the above cases was deemed void, the reasons against the validity of the note in this cause are certainly more cogent and conclusive; but it is notwithstanding contended that this is a defense set up against third persons, who are subsequent holders for a valuable consideration and without notice. This, according to the view before taken of the subject, could not give validity to the note if void *ab initio*. It cannot, however, be made a question in the present case, because it does not satisfactorily appear that a consideration had been given for the note by the holders, and because they had sufficient notice of

the manner in which it was originally obtained by the payee as their agent.

It appears that the plaintiffs still hold the former notes given by Rice and Bush to them and indorsed by Forsaith, the payee of the note in question; who, without making any arrangement at the time it was so transferred to deduct from that debt the amount of this note, which debt was also stated on the defendant's schedule delivered in to the recorder, and for the payment of which the same liability exists; so that the whole demand remained in the same situation, without affording any benefit to Forsaith, the indorser of this note. To say the least, therefore, it is extremely questionable whether any consideration can even be presumed to have passed to Forsaith from the plaintiffs for the note.

By the indorsement on the note of the real date, the plaintiffs had such information as ought to have led to an inquiry into the manner the payee had obtained it. The post-dating of the note which was indorsed was an extraordinary circumstance, and must have created suspicion. The neglect of the plaintiffs to make any inquiry, ought to subject them to the consequences of the transaction between the defendant and Forsaith, the immediate or original parties; and, as between them, it is decidedly illegal consideration. It is, however, manifest from the face of the transaction, that Forsaith, the payee and indorser of this note, acted as the agent of the plaintiffs; they of course are bound by his acts, and are subject to the same consequences as if the whole had been conducted by themselves; so that independent of other reasoning on the subject, this alone is sufficient to prevent a recovery. The motion for a new trial must accordingly be denied.

Motion denied.

ADAMS v. FREEMAN.

[12 JOHNSON, 408.]

ENTERING DWELLING-HOUSE A TRESPASS.—One who enters a dwelling-house without permission of the occupant, and remains there after being requested to leave, is guilty of a trespass; and if he had permission to enter, and remained after a request to leave, he would then be liable as a trespasser *ab initio*.

ERROR ON *certiorari* to a justice's court. The plaintiff brought trespass against the defendant for his entering the house of the plaintiff. The defendant pleaded not guilty; and on trial the plaintiff proved that, he being in bed (in the day time or night,

not stated), the defendant entered the house without permission. The plaintiff's son, by order of his father, requested the defendant to leave; the defendant replied that he would go when he pleased, and he gave a similar answer to the plaintiff's wife. The plaintiff then rose from bed and ordered the defendant to leave his house, but he still refused, and remained there half an hour, without doing any other injury, and then departed. The defendant moved for a nonsuit, and the justice decided that the proof was insufficient to sustain the action, and nonsuited the plaintiff with costs.

By COURT. To enter a dwelling-house without license is in law a trespass. Any person professing to keep an inn, thereby gives general license to all persons to enter his house. But the house of the plaintiff does not appear to have been an inn, and therefore, to render such an entry lawful, there must be a permission, express or implied, and familiar intimacy may be evidence of general license for such purpose. According to the evidence here was no such permission, and therefore the act of entering the plaintiff's house was a trespass. Besides, if the defendant had received permission to enter, as by being asked to walk in, upon his knocking at the door, his subsequent conduct was such an abuse of the license as to render him a trespasser *ab initio*.

Judgment reversed.

Cited and followed in *Markham v. Brown*, 37 Ga. 231; *Markham v. Brown*, 8 N. H. 531; *Stephens v. Lawson*, 7 Blackf. 276; *Allen v. Crofoot*, 5 Wend. 510; *Martin v. Houghton*, 45 Barb. 290.

ARNOLD v. CAMP.

[12 JOHNSON, 406.]

PARTNER'S NOTE FOR FIRM DEBT.—Where a partner gave his individual note, taking up a promissory note issued by the firm, the firm liability is thereby discharged.

ACTION on a promissory note, payable to the plaintiff, or bearer, on demand, made by Camp and one Downing, his partner, against whom process had been issued, but who was not served. The note had been given up by the plaintiff to Downing, upon the latter giving his own note for the amount; but Downing afterwards took back his own note and returned the partnership note to the plaintiff, on the plaintiff's telling him

that if he did not do so, he should work for him no longer. The partnership between Camp and Downing was dissolved, and the plaintiff had notice of the dissolution. Camp had given Downing property for the purpose of taking up this note.

A verdict was found for the plaintiff, subject to the opinion of the court.

C. M. Lee, for the plaintiff.

Storrs & N. Williams, contra.

By Court, THOMPSON, C. J. The question is, whether under the circumstances of this case Camp is not discharged from all responsibility upon this note. There is nothing in this case showing that Downing is insolvent, or unable to pay the note he gave in his individual capacity. As Downing had received property to discharge the note, the re-delivery of it to the plaintiff was unjust, as it respected Camp, and he is justified in availing himself of all legal measures to exonerate himself from the payment. The circumstances appear to fully warrant the conclusion that the individual note of Downing was intended to be given to and was actually received by the plaintiff in satisfaction of the partnership note. This was delivered up for the purpose as must necessarily be inferred, of being destroyed. This is a much stronger case than that of *Sheehy v. Mandeville*, 6 Cranch. 264. It is there held, that although as a general principle, a promissory note will not of itself discharge the original cause of action, yet if by agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. That case also shows that the doctrine of *nudum pactum* has no application to cases like the present; there also, as in this case, it was the note of one of the firm that was held to discharge the partnership. The same doctrine is maintained in *Newmarck v. Clay*, 14 East, 239, and in *Toby v. Webster*, 5 Johns. 72, this court considered the acceptance of a note as an extinguishment of a pre-existing debt, if agreed to be received as payment, and *Whetherby v. Mann*, 11 Johns. 518, is a still stronger case. It is there held, that where a negotiable note has been received in satisfaction of a judgment, it is an extinguishment of the judgment debt. If the facts then in the case before us will warrant the conclusion, that when the individual note of Downing was taken, and the partnership note delivered up, it was intended and agreed to be considered as payment of the note in question, there can be no doubt that, in judgment of law, it will operate as a satisfaction

of the partnership note, and that the facts not only fairly, but necessarily, lead to such a conclusion, will, in my opinion, admit of no doubt. The defendant is accordingly entitled to judgment.

Judgment for the defendant.

The last citation of this case in the New York courts shows us the principle on which the decision rests. In *Millerd v. Thorne*, 56 N. Y. 406, Grover, J., says: "When a creditor of a partnership, after dissolution thereof, knowing that one or several of the partners have agreed with the others to assume and pay the debts of the firm, takes the negotiable notes of those who should pay in payment of the debt of the firm, he thereby cancels the claim against the firm, and discharges the other partners: Story on Partnership, secs. 155, 156, and notes; Collyer on Partnership, book 3, sec. 3, and cases cited; *Arnold v. Cossap*, 12 Johns. 409; *Waydell v. Luer*, 3 Denio, 410."

In *Crooker v. Crooker*, 52 Me. 270; *Lear v. Friedlander*, 55 Miss. 567; *Torrey v. Baxter*, 13 Vt. 458; *Ryan v. Dunlap*, 17 Ill. 44, its authority is recognised and followed. In a late case in Rhode Island, *Nightingale v. Okafee*, 12 R. I. 609, Durfee, C. J., considers the subject of the decision, and refers to this case. Here it is held that a promissory note given for an antecedent debt does not discharge the debt, unless the note is given and received as absolute payment; and the burden of proof is on the debtor to show that it was so given and received. Nor does it make any difference that the makers of the note so given are fewer in number than the original debtors. This general subject of the giving of a partner's note for a firm debt is discussed in a note to *Pateshall v. Apthorp*, 1 Am. Dec. 4.

VAN EPS *v.* SCHENECTADY.

[12 JOHNSON, 426.]

AGREEMENT FOR DEED.—An agreement to execute and deliver a deed for land is satisfied by executing a deed without warranty or personal covenants.

LAND SOLD IN LOTS—FAILURE OF TITLE TO PART.—If on a sale of land in separate lots and parcels to one person, the title to one or more of such lots fails, the vendee cannot rescind *in toto*, but he must accept a conveyance for such of the lots as the vendor is authorized to convey.

ASSUMPSIT for money had and received to recover back the consideration money and interest for thirty-three lots of land. Plea, *non-assumpsit*. The land was sold at public auction to the plaintiff as the highest bidder. The lots were put up and sold separately, one after the other, each lot being sold for a separate price. The treasurer of the defendant, the city of Schenectady, delivered to the plaintiff thirty-three certificates, of one of which the following is a copy: "In virtue of a resolution of the mayor, alderman and commonalty of the city of Schenectady, I do hereby certify that Abraham Van Eps has

this day purchased at public auction lot No. 1 of the first allotment on the Albany and Schenectady turnpike, in the second ward of the said city, for the sum of fifty dollars, one fourth of which amounting to twelve dollars and fifty cents, I have this day received, and upon his paying the sum of twelve dollars and fifty cents, in six months from this date, the sum of twelve dollars and fifty cents in one year and six months from this date, and the sum of twelve dollars and fifty cents, being the residue of the said sum of fifty dollars, in two years and six months from this date, with lawful interest on the said sums, from time to time, to be paid as aforesaid, then and in such case, a deed will be executed by the mayor, alderman, and commonalty of the said city to the said Abraham Van Eps, his heirs and assigns forever. Eighth October, 1806."

After payment of the sums pursuant to agreement, the plaintiff applied and demanded a deed for the lots. The mayor showed him a blank quitclaim deed, which he offered to execute. The plaintiff was then informed that one Schermerhorn was in possession of part of the land, and defendant had brought an action of ejectment against him, but had failed. The plaintiff refused to receive a deed, except such as would secure him the purchase-money, in case the title failed; but the mayor refused to give any other than a quitclaim deed.

On the fifth of May, 1812, it was resolved by the corporation that the treasurer be directed to collect the amount due for the lots, except those about which there was a controversy. At this time the plaintiff was a member of the corporation, and continued so for twelve months thereafter. The whole of the purchase-money and interest was paid by the plaintiff—that paid on the lots 11, 12 and 18, in possession of Schermerhorn, was eight hundred and thirty-four dollars and sixty-five cents.

The auctioneer who sold the lots testified that the treasurer was present, and stated the terms of the sale, but nothing was said as to the nature or form of the deed to be given; and that he never heard that Schermerhorn, or any other person, had the possession or claim to any of the lots. Another witness testified that the adverse possession of Schermerhorn was a matter of public notoriety at the time of the sale.

The judge was of opinion that the plaintiff was entitled to recover the amount of eight hundred and thirty-four dollars and sixty-five cents only. The jury, however, found a verdict for the whole purchase-money, subject to the opinion of the court; and should the opinion be that the plaintiff had no right

to rescind the contract as to all, the verdict was to be reduced to eight hundred and thirty-four dollars and sixty-five cents; or if the sale of any had no right to be rescinded, then a nonsuit was to be entered.

Hudson and T. Sedgwick, for the plaintiff, relied on *Judson v. Wass* [6 Am. Dec. 392]; *Frost v. Raymond*, 2 Id. 228, showing that a clear and unincumbered title should be given.

J. V. N. Yates, contra, argued that the purchase-money should not be returned unless there was fraud, or in case of a breach of warranty, citing 2 East, 269; 1 Bos. & P. 260; 1 Esp. N. P. Cas. 279. In *Nixon v. Hyserott*, 5 Johns. 58, a conveyance was held good and perfect though it contained no personal covenants of warranty. The purchaser is only entitled to a compensation *pro tanto*: *Poole v. Shergold*, 2 Bro. C. C. 118.

By Court, *YATES, J.* In the certificate or contract executed by the treasurer of the corporation, and countersigned by the purchaser, the lot sold is mentioned, and that upon the purchaser's making the payments particularly stated, a deed will be executed for it by the defendants to the purchaser, and in this instance, to the plaintiff, his heirs and assigns forever. This certainly, according to the terms used, does not create an obligation on the part of the corporation to execute a deed containing the covenants insisted on by the plaintiff. The deed stated in the case, and offered to be executed by the mayor, was a sufficient compliance with the terms of the contract, to exonerate the defendants, and unless other circumstances are disclosed by the evidence to justify the plaintiff in his demand to have the covenant required by him inserted, he is still held by the contract, and obliged to accept of the conveyance offered him. By covenanting to execute a deed, no greater duty or obligation can be intended than to execute a conveyance or assurance of the property, which may be good and perfect, without warranty or personal covenants. Its meaning in the contract before us is clear and decisive, and will not, even by implication, admit of a more extended construction or definition.

In the case of *Frost v. Raymond*, 2 Caines, 191 [2 Am. Dec. 228], it is stated in the opinion of the court to be a settled position, that an estate in fee may be created by the usual and solemn forms of conveyance without warranty, express or implied, and that a conveyance in fee does not *ipso facto* imply a warranty, that if it did, our books would be inconsistent and unintelligible on the subject. The case of *Nixon v. Hyserott*, 5

Johns. 58, supports the same principle, and shows that a general power to execute a deed does not authorize the giving it with the usual covenants of warranty, etc. It is evident then, that where it is contracted to execute a deed as in this case to the plaintiff, his heirs and assigns forever, no covenant of any description can be intended, either by implication or otherwise, nor will the circumstance of the sale being at auction vary the result. It must entirely depend on the contract made at the time, which in this case is conclusive against the insertion of the covenant required by the plaintiff, as appears from the conditions or terms of sale previously made known by the treasurer, and the subsequent memorandum or certificate under the signature of the parties. It cannot be pretended that this was one entire contract for all the lots. They were put up at auction separately, and a certificate given for each lot, which was countersigned by the purchaser, so that the corporation were obliged, if required, to give separate deeds. The offer by the mayor, to give one deed or quitclaim for all the lots purchased by the plaintiff, will not give such a character to the transaction as to make it an entire contract, and thus authorize a relinquishment on the part of the plaintiff, of the purchase of the whole thirty-three lots, because a part of them might have been held adversely at the time of sale. The fact that each lot was separately contracted for, appears so conclusively from the evidence in the case, as in my view to put the right of rescinding on the ground that the purchase of all those lots was one entire contract, wholly out of the question, and therefore the existence of an adverse possession of a part of the lots could not affect the contracts for the residue.

From the facts disclosed by the case, it does appear that lots Nos. 11, 12 and 13, were held adversely to the title of the defendants at the time the plaintiff contracted to purchase them, and continued so until the payments for them were made, which would, of course, have rendered a deed for those lots, if it had been executed, wholly inoperative. The plaintiff ought consequently to recover back the amount of the consideration-money paid for them. The verdict must therefore be reduced to eight hundred and thirty-four dollars and sixty-five cents, according to the stipulations in the case, for which the plaintiff must have judgment.

Judgment for the plaintiff.

See *Ketchum v. Evertson*, *post*, for a similar decision, where the authority of this case is affirmed.

WALKER v. SWARTWOUT.

[12 JOHNSON, 444.]

PERSONAL LIABILITY OF PUBLIC AGENT.—A public agent in his known official capacity, employing a man to labor on government work, cannot be held personally liable for the wages of the party so employed.

ASSUMPSIT for work and labor. The defendant was quartermaster-general of the army. He directed certain boatmen who were with the army, and the plaintiff among the rest, to go to work for the use of the army, and that they should be each allowed two dollars per day and one ration; and the plaintiff did so, and worked in making tents, etc. After working about six weeks, the defendant was about to remove and the plaintiff applied to him for a certificate, as evidence of his labor, and the defendant replied, "My word is sufficient," and told him to go to work and he would pay him when his work was done. The plaintiff was discharged subsequently without receiving any pay. The plaintiff applied to the deputy quartermaster-general, who paid the plaintiff twenty dollars. The deputy testified that the plaintiff when he applied to him, had informed him that he had worked for the defendant but produced no certificate, but knowing the plaintiff he gave him twenty dollars and took his receipt as deputy quartermaster. A verdict was found for the plaintiff, subject to the opinion of the court.

Benedict, for the plaintiff.

Storrs, *contra*.

THOMPSON, C. J. The only question in this case is whether the defendant is personally responsible to the plaintiff for the work, labor and services performed by him. That the defendant was a public officer, and that the benefit of the plaintiff's labor was for the public, are questions not in dispute. If the case of *Sheffield v. Watson*, 3 Caines, 72, is to be supported, there can be no doubt of defendant's liability. And independent of that case it appears to me he is responsible, upon well settled principles, applicable to this class of cases. It is not to be denied that an agent may make himself personally responsible. And, as was said by this court in the case of *Gill v. Brown*, decided at the present term (and which is a principle recognized in all the cases on this subject), it is a question of intention in the contracting parties, and this intention must be collected from the circumstances of the case. In my judgment, the circumstances showing a personal liability in the defendant in this

case are as strong, if not stronger, than in the case last referred to. Here is not only an absolute and unqualified promise to pay, but a refusal to furnish the plaintiff with the usual and necessary voucher to enable him to procure compensation from the government. The case states that the plaintiff went to work by the direction of the defendant, and after some time, hearing that the defendant was about leaving the place, the plaintiff applied to him for a writing or certificate, as evidence of the contract and of the time he had worked. The reply made by the defendant was: "My word is sufficient; go to your work and I will pay you when it is done." The defendant was too well acquainted with his business to suppose his bare word was sufficient to enable the plaintiff to obtain his pay from the government. He well knew that some voucher from him was necessary for this purpose, if the plaintiff was to be turned over to the government. When he, therefore, told the plaintiff his word was sufficient, and at the same time accompanied it with a promise to pay, it appears to me to admit of no other reasonable interpretation than a personal engagement to pay. Had this not been the intention of the defendant, his reply to the plaintiff's request would not have been, I will pay you when your work is done; but, I will then give you a certificate. The promise was to pay when the work was done, and if the plaintiff was to look to the government for pay, how could the defendant know when payment would be made.

It is the duty of an agent, and the usual course of business, not only to disclose the character in which he acts, but also to furnish those with whom he deals with all requisite vouchers to enable them to have recourse to the principal; and when this is refused, the reasonable intendment—and I apprehend the legal effect—is, that the agent is personally liable. When one acts as the agent or attorney of another, he ought to do it in the name of him who gives the authority, and cannot do it in his own name: 9 Coke, 76. Where services are performed for a known public agent, without any express contract, and the party relies upon an implied obligation to pay, perhaps the law would also imply that the service was performed for the agent in that character. But where the agent makes an express contract, or promise in his own name, and not in the name or on behalf of his principal, the agent ought to be held personally responsible. This necessarily grows out of the principle that an agent or attorney must contract in the name of his principal. This appears to me to be a sound and reasonable dis-

tion, and best calculated to prevent parties from being misled or deceived. In the case of *Brown v. Austin*, 1 Mass. 208 [2 Am. Dec. 11], it is admitted by the counsel on both sides that if an agent make an express promise to pay, he is personally responsible, and this seems to be taken for granted by the court. Sedgwick, J., says, there is no doubt but an agent, by an express undertaking in his private capacity, makes himself personally liable. When there is an express undertaking, it must, I presume, always be understood to be by the party in his private capacity, unless otherwise expressed. No part of the plaintiff's conduct would justify a conclusion, that he did not look to the defendant for pay, or consider him liable. When application was made by the plaintiff to Brown, the deputy quartermaster he informed him he had been at work for General Swartwout, and had nothing to show for his work, and did not know to whom or where to look for his pay. Well might he say he did not know where to look for pay, for the defendant had left that part of the country, as appears by the case, or is necessarily to be inferred, and had refused to give him any voucher for his services. The defendant had not pursued the usual course of the public agents, who meant to turn the workmen over to the public for payment, as would appear not only from the known and general practice, but from the conduct of Brown, who had employed this very plaintiff, and gave him a certificate of the contract on account of the public. The plaintiff had good reason to conclude that the defendant considered himself bound to pay him for his work, when he not only refused to give him any certificate that he might look to the government, but expressly promised to pay him; and I think he was fully warranted in such conclusion, upon the soundest principles of law and justice. I am accordingly of opinion, that judgment ought to be for the plaintiff.

SPENCER, J. It was supposed, on the argument of this cause, that the case of *Sheffield v. Watson*, 3 Caines, 69, overruled the decision of the supreme court of the United States in the case of *Hodgson v. Dexter*, 1 Cranch, 345, and *Macbeath v. Haldiman*, 1 T. R. 172, and several other cases in the English courts; but on as critical an examination as I have been able to give of the subject, I cannot assent to that proposition. Judge Livingston, who delivered the opinion of the court, expressly states that it was not intended to shake any of the English authorities on the point, and he states that the court in *Hodgson v. Dexter* regarded the contract as made entirely with a view to government, and

that when that appeared, it would be unjust to charge the officer.

Whether the court in *Sheffield v. Watson* made a correct application of the principles recognized and established in these two cases, to the facts before them, may, I think, admit of some doubt, but certainly we did not intend to overrule them. We have all of us had occasion to remark that though we concur in the point decided, unless our dissent be stated, yet we are not committed by the illustrations of the judge who happens to give the opinion. I make this remark here because I confess the train of the judge's reasoning in *Sheffield v. Watson* does not appear to me perfectly reconcilable with the declaration, which I am fully convinced is correct, that we did not intend to shake any of the English authorities. I shall forbear stating the particular circumstances in *Sheffield v. Watson* which may distinguish that case from the two leading ones already cited. It appears to me that the opinion of Ashhurst, J., in *Macbeath v. Haldiman*, is entitled to the most unreserved respect, for its clearness and perspicuity. He observes: "A person acting in the capacity of an agent may undoubtedly contract in such a manner as to make himself personally liable, and that (he says) brings it to the true question—namely, whether, from anything that passed between the parties at the time, it was understood by them that the plaintiff was to rely upon the personal security of the defendant." He proceeds to state the facts, and then adds, "that there is nothing in this transaction to fix the defendant, or to show that the plaintiff looked to him as his debtor at the time the credit was given." Buller, J., in the same case, uses these strong expressions: "And in any case, where a man acts as agent for the public and treats in that capacity, there is no pretense that he is personally liable." In ascertaining the intention of the parties, the court regarded the existing facts when the goods were furnished, and the subsequent conduct of the parties.

The chief justice, in delivering the unanimous opinion of the court in *Hodgson v. Dexter*, observes: "It is too clear to be controverted, that where a public agent acts in the line of his duty and by legal authority, his contracts, made on account of the government, are public and not personal." After stating the facts which went to show that the house was taken on account of the public in pursuance of authority, and that the contract was made by the head of a department, for his use as an officer of government, he then adds: "Under these circum-

stances, the intent of the officer to bind himself personally must be very apparent indeed to induce such a construction of the contract."

It has been argued in this case that the defendant promised to pay the plaintiff for his work when it was done. The same argument was urged in *Hodgson v. Dexter*, and the fact in that case was that Mr. Dexter covenanted, under his seal, to keep the premises in good repair, inevitable casualties, etc., excepted, and to yield up the same at the end of the term, the same so well and sufficiently kept in repair; but the court, holding it to be a contract entirely on behalf of government, considered the obligation to be on the government only, and not a personal undertaking.

The facts in this case show very clearly that it never was in the contemplation of either party, originally, nor until sometime after the labor was done, that the defendant should be personally responsible. The plaintiff was employed on the public account to proceed down the St. Lawrence, as a boatman with the army, and received a certificate of his being thus employed. On his arrival at the French mills with the army, the defendant, who was known to the plaintiff to be quartermaster-general, and acted as such, directed the plaintiff to go to work with the rest of the hands, for the army, and that they should each be allowed two dollars a day. The plaintiff, after working about six weeks, learning that the defendant was about leaving the place, applied to him for a writing, or certificate as evidence of the contract, and the time he had worked. The plaintiff drew his rations from the public storehouse, and after leaving the French mills, applied to Major Brown, an assistant quartermaster-general, stating that he had been to work for General Swartwout, but had nothing to show for his work, and did not know to whom, or when, to look for his pay, upon which Major Brown advanced him twenty dollars, as assistant quartermaster-general.

These facts abundantly show that the defendant's contract with the plaintiff was as a public agent, and that the plaintiff did not work nor contract to work, with a view to the defendant's responsibility. I entirely agree with Chief Justice Marshall that, to hold a public agent, acting in the line of his duty, liable for contracts made on account of government, would be productive of the most injurious consequences to the public, as well as to individuals and that no prudent man would consent to be

come a public agent, if he should be made personally responsible on the public account.

This is not the case of an insulated boatman. The same principles which will render the defendant liable in the case will, for aught I perceive, make him liable to all the boatmen who descended the St. Lawrence with the army, for it seems the defendant set them all at work at two dollars a day, and hence the greater improbability that he meant to subject himself. I am, therefore, of opinion that the defendant is entitled to judgment.

VAN NESS, YATES and PLATT, JJ., were of the same opinion.

Judgment for defendant.

VAN BRACKLIN v. FONDA.

[12 JOHNSON, 402.]

SALE OF PROVISIONS FOR DOMESTIC USE.—In the sale of provisions for domestic use, there is an implied warranty that they are sound and wholesome.

ERROR on certiorari to a justice's court. Fonda, the plaintiff below, declared against Van Bracklin on account of his selling him a quarter of beef as good and sound, when it was bad and unwholesome. It appeared that Fonda purchased of him a quarter of beef for his own use; that the cow had eaten shortly before being killed, a large quantity of peas and oats, and that she was slaughtered for fear that she would die in consequence thereof; and it was proved that those who eat of the beef were generally made very sick, and that one of Fonda's servants was sick for two weeks from eating the meat. The jury found a verdict for the plaintiff below for five dollars damages.

By Court. The verdict settles the facts that the beef sold was unsound and unwholesome, and that the defendant below knew the animal to be diseased, and did not communicate that fact when he sold the beef to the plaintiff below. In 3 Bl. Com. 165, it is stated as a sound and elementary proposition that in contracts for provisions it is always implied that they are wholesome, and if they are not, case lies to recover damages for the deceit. In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome at their peril. This is a principle not only salutary, but necessary to the preservation of health and life.

In the present case, the concealment of the fact that the animal was deceased, is equivalent to the suggestion of a falsehood that she was sound.

Judgment affirmed.

See the note to *Emerson v. Brigham*, 6 Am. Dec. 109, where this subject is considered and this case cited.

FIREMEN'S INS. CO. v. WALDEN.

[12 JOHNSON, 512.]

MATERIALITY OF FACTS FOR THE JURY.—In effecting a policy of insurance, whether certain facts are material to the risk, and should be disclosed to the insurers, is for the consideration of the jury, and the court has no right to direct the jury as to the materiality of such facts.

ACTION on a policy of insurance on the ship *Suffolk* from Belfast to Lisbon, and thence to New York. The vessel sailed from New Orleans in September, 1810, and was compelled to put into Havanna for a supply of water. The vessel, after a short stay, resumed her voyage for Belfast, but in consequence of damage from tempestuous weather, she was compelled to put into Cork, where she arrived on the eighteenth January, 1811, and having been there repaired, arrived in Belfast on the third of May. The vessel and cargo had been placed by the plaintiffs under the general direction and control of Cropper & Co. of Liverpool, and while at Cork, Harvey & Co. acted as agents for the ship. On the nineteenth March, 1811, the latter wrote to Cropper & Co., stating that "a vessel had got foul of the *Suffolk*, and carried away her bowsprit; that they feared that Captain Cartwright was careless of his business, and that his amount of repairs and expenses would astonish them all; that they had no control further than to recommend, as he was his own master; that his detention had been very great, yet he seemed very easy under it." A copy was transmitted by Cropper & Co. to the plaintiffs, who were informed: "This day we shall write again [to Cartwright] pointedly, and urge that necessity of economy and despatch, which we early enjoined him to observe. All that in us lies shall be done to get the *Suffolk* on to Belfast, and to guard your interest; but if a master of a ship will not do his best, an agent is placed in ungrateful circumstances. The accident to his bowsprit will cause some further, but we hope not much, delay to pursuing her voyage." These letters were received before the plaintiffs effected insurance, but

they were not communicated to the insurers. The plaintiffs replied to these letters, directing Cropper & Co. to discharge the captain, if their judgment approved of such a course.

The ship left Belfast on the second of July, with instructions to proceed to Lisbon, and thence to New York. She arrived at Lisbon on the fourteenth of July, and having taken in eighty mays of salt, for which the master gave a bill of lading to deliver the same in New York, she left Lisbon with directions to proceed to New York. Two weeks before leaving Lisbon, the master expressed to his mate an intention of going to New Orleans, but on being questioned by one of the consignees at Lisbon, who heard the report, he denied it, and declared he was proceeding to New York. The vessel, notwithstanding, proceeded to New Orleans, and took a circuitous route, proceeding through the West India Islands. She arrived at Matanzas, in Cuba, on the seventh of October, and the captain went to Havana to obtain a new cable and anchor, which were brought on board on the eighteenth of October, but notwithstanding, the master detained her until the twenty-ninth of November. While here, the captain hypothecated the vessel to one Drake, for one thousand five hundred and sixty-three dollars, but how the debts which were thus secured had arisen, or how the money had been appropriated, did not appear. He likewise gave a bill of lading on account of some advances made to him of the salt, to one Madan, a merchant, to be delivered to one Morgan, at New Orleans.

The vessel arrived at New Orleans in December, 1811. The plaintiffs' agent there, by their direction, demanded of the captain possession of the vessel, which he refused; and then application was made to court, but during the pendency the ship was libelled on the bond to Drake, and by order of the court, she was sold for the benefit of all parties. The salt was claimed by Morgan, and on the plaintiffs' agent opposing his claim, an attachment was procured at his instance against the salt, and also the ship, and by order of the court, the salt was appraised, and bonded by the plaintiffs' agent.

The judge charged the jury, that the evidence of barratry was conclusive, and that the insured were not bound to communicate to the insurers, at the time of making insurance, any of the letters mentioned, nor any of the circumstances within their knowledge respecting the master of the ship. A verdict was found for the plaintiffs, and the defendants excepted to the opinion of the judge. A motion on a bill of exceptions was

made to set aside the verdict and for a new trial. The opinion of the supreme court was delivered by Platt, J., who held the plaintiffs were entitled to recover. The case was taken on a writ of error to the court of errors where the case was argued by *S. Jones and Wells* for the plaintiffs in error, and *Griffen and Henry* for the defendants in error.

KENT, Chancellor. The case comes up on a bill of exceptions, and we are accordingly to be confined to the objections taken at the trial and appearing on the face of the bill. The question is, whether there was error in the charge which the learned judge delivered to the jury. This charge was "that the several matters given in evidence on the part of the plaintiffs, were in his opinion conclusive evidence of the barratry of the master of the vessel, on the voyage, and that the plaintiffs were not bound to communicate or disclose to the defendants any of the letters, matters or circumstances which were at the time of the insurance in their possession, relative to the master; and that the matters given in evidence, on the part of the defendants, were not sufficient to maintain the issue on their part or to bar the action of the plaintiffs; and that if the jury agreed with him in opinion they ought to find a verdict for the plaintiffs," and with that charge he left the matter to the jury.

The counsel went at large into the discussion of the question whether the assured were bound to communicate to the underwriters, at the time they applied for insurance, the letters and other knowledge they possessed of the improper conduct of the master. But it appears to me that this question is not for the decision of this court, because whether the circumstances relative to the master ought to have been disclosed, depends upon the question whether those circumstances were material to the risk, and the materiality is a question of fact for a jury, and not a question of law for the court. It is a well-settled principle in the law of insurance, that what facts, in the knowledge of the assured are material and necessary to be communicated to the underwriter, when insurance is asked for, is for a jury to determine; and I will briefly notice a few cases in illustration of this point. My whole opinion will rest upon the admission and the solidity of this principle.

In *Macdowall v. Fraser*, Doug. 260, it was assumed by the K. B. as a given point, and it was said expressly by one of the judges that the materiality of a certain representation to the underwriters was proper for the consideration of the jury; and in the case of *Shirely v. Wilkinson*, which came before the same

court two years afterwards, Doug. 396, n., Lord Mansfield and the rest of the court were of opinion that if the assured at the time when the policy is effected, in representing to the underwriters the state of the ship and the last intelligence concerning her, does not disclose the whole, and what he conceals shall appear material to the jury, they ought to find for the underwriter, though the concealment should have been innocent. The next case I shall mention is that of *Willes v. Glove*, 4 Bos. & P. 14, in which the court of C. B. admit the same doctrine; and on the question whether the concealment of a certain letter was material, the court held the verdict to be against evidence, and awarded a new trial. And they declared that though great respect was due to the opinion of the jury, still they thought their judgment on that point had been too hastily formed, and that the case ought to be reconsidered. In *Littledale v. Dixon*, 4 Bos. & P. 151, the same court afterwards unanimously and very explicitly declared their opinion that every material circumstance must be disclosed, but that it was for the jury to say how far any given circumstance was material. From these cases it appears that the principle which I have stated as the ground of my opinion is settled in the English courts; and I will now show that it is as explicitly acknowledged in our American law.

In *Livingston v. Delafield*, 1 Johns. 522, the supreme court of this state declared that, whether certain information which the assured knew, and did not communicate, became material, was a question of fact that the jury were to decide; and the same doctrine had been previously advanced by the most distinguished counsel (Hamilton and Harison), and evidently acquiesced in by the court in a case which arose some years before: 1 Caines, 229. So in *Murgatroyd v. Crawford*, 8 Dallas, 491, in the supreme court of Pennsylvania, Shippen, C. J., declared that if, in the opinion of the jury, a knowledge of the circumstances that were suppressed would have induced the insurer to demand a higher premium, or refuse altogether to underwrite, it would be sufficient to invalidate the policy. Again, in the case of *Marshall v. Union Ins. Co.*, decided in the circuit court of the United States, for the district of Pennsylvania, 1 Condry's Marshall, 473 b, n., the court left it pointedly to the jury to judge of the materiality of circumstances not disclosed. And to conclude with the highest judicial authority in this country, the supreme court of the United States has decided, on two different occasions, *Livingston v. Maryland*

Ins. Co. and Maryland Ins. Co. v. Rudens, 6 Cranch, 274, 338, that the operation of any concealment on the policy depends on its materiality to the risk, and that this materiality was a subject for the consideration of a jury, and must be left to them. One of those cases was considerably analogous to the one now before us. It came up on error, founded on a bill of exceptions taken at the circuit, and the court say that the effect of a misrepresentation, or concealment, depends on its materiality to the risk; and this must be decided by a jury under the direction of the court. And in that case, said the C. J., it had not been decided, and consequently a *venire facias de novo* was awarded to the end that a jury might pass upon the question of a material concealment.

It is thus settled (as far as authority goes), beyond all doubt or contradiction, that, whether the matters not disclosed in this case were material, was a question that ought to have been submitted to the consideration and decision of the jury. And here, I apprehend, lies the error committed by the learned judge, that he has given a binding direction to the jury, upon matter of fact, as if it had been matter of law. It appears to me that the true and necessary construction of the charge, as stated in the bill, is, that it was a positive direction in point of law, as to the materiality of the non-disclosure, and that it must have been so received and obeyed by the jury. If the charge had been intended as a mere opinion to the jury, on a matter of fact on which they were to exercise their judgment, the jury would undoubtedly have been told that the defense in the case rested upon the question of the materiality of the letters and facts not disclosed, and that it was for them to judge, from the evidence, whether the disclosure would have varied the premium, or increased the risk in respect of the barratry of the master, and that if the party should be of opinion that the facts not disclosed were in that sense material, they must find for the defendants; and that if they thought otherwise, they must find for the plaintiffs. This would have been the language of a charge suited to the submission of such a point; and we have an example of this species of charge (if indeed an example can be wanting) in the bill of exceptions taken in the case of *Smith v. Carrington*, 4 Cranch, 64. If, then, the judge had deemed it proper to add his own opinion on that fact for the assistance or satisfaction of the jury, it might have been done with utility and with safety. But the charge, as stated in the case, is not of this nature, but is in the usual style and language of a direc-

tion of the court on a matter of law. The precedent of a bill of exceptions, which was cited from Buller's N. P. 817, and which is given as for misdirection, is in the language of the charge in this case: "And the said chief justice did then and there (says the precedent) declare and deliver his opinion to the jury, that the said several matters so produced, and proved on the part of the defendants were not, upon the whole case, sufficient to bar the plaintiff of his action. And with that direction left the same to the jury." There is a precedent of a bill of exceptions given in 8 Burr. 1742, and which was taken to a charge on the subject of search-warrants made by Lord Camden, when C. J. of the C. B.; and the language of this very authentic precedent is almost in the very words of the one before us: "And the said chief justice did then and there declare and deliver his opinion to the jury, that the said several matters so produced and proved on the part of the defendants were not, upon the whole case, sufficient to bar the action, and with that opinion left the same to the jury."

In this case from Burrow, it was never doubted but that the opinion of the chief justice, so stated in that bill, was taken and received as a direction in point of law; and if the charge in the case before us is not to be deemed in that character, it will be impossible hereafter to discriminate between a charge containing a positive direction in point of law and mere advice on a matter of fact.

I shall not enter into any minute criticism on words. No one who consults the precedents can well be at loss for the meaning of this charge. The language of the learned judge was, that the plaintiffs were not bound or required to make the disclosure. That the matters offered in evidence were not sufficient to bar the action, and nothing was said about the weight of evidence for the consideration of the jury. If even it was doubtful, by the bill, whether the charge was intended by direction, or otherwise, the result of my opinion would be the same, because when the judge interposes his opinion to the jury on a point of fact, it ought not to be left in doubt in what light they are to receive his charge. In order to preserve a just balance between the distinct powers of the court and the jury, and that the parties may enjoy in unimpaired vigor their constitutional right of having the law decided by the court, and of having the fact decided by the jury, every charge should distinguish clearly between the law and the fact, so that the jury cannot misunderstand their rights or their duty, nor mistake the opinion of the

judge upon matter of fact, for his direction in point of law. The distinction is all important to the jury. The direction of the judge in the one case is obligatory upon their consciences, and so they will and so they ought to regard it. But his opinion in the other case is mere advice, and the jury are bound to decide for themselves, notwithstanding the opinion of the judge, and to follow that opinion no farther than it corresponds with the conclusions of their own judgment. Unless this distinction be kept steadily in view, and be defined with all possible precision, the trial by jury may in time be broken down and rendered nominal and useless.

I am far from wishing to restrain the judges of the courts of law from expressing freely their opinions to the jury on matters of fact, and still less from interfering with their power of controlling the mistaken verdicts of juries by a liberal exercise of the discretion of awarding new trials. No man can be more deeply sensible of the value and salutary tendency of this judicial aid and discretion, and none certainly can possess higher confidence in the character and wisdom of the court whose judgment is now under review. All that I feel it my duty to contend for is, that whenever the judge delivers his opinion to the jury on a matter of fact, it shall be delivered as mere opinion, and not as direction, and that the jury shall be left to understand clearly that they are to decide the fact upon their own view of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt. It is for this principle that I feel solicitous, and not for anything that may have taken place in this particular cause. The case before us is, comparatively, of trifling consequence, but the distinction I have suggested goes to the very root and essence of trial by jury, and may indeed become of inestimable value, and perhaps of perilous struggle, when the present generation shall have ceased to exist. I am disposed to hand to posterity the institution of juries as perfect, in all respects, as we now enjoy it, for I believe it may in times hereafter be found to be no inconsiderable security against the systematic influence and tyranny of party spirit in inferior tribunals.

Had the bill of exceptions been represented to the court below, in the view I have now considered it, I am satisfied that that court would have unanimously recognized the justness of the principle for which I contend. Their attention was wholly drawn to the question of the materiality of the proof. If, then,

the charge of the learned judge is to be considered, as I think it must be, as a declaration to a jury, that the papers and facts not disclosed were, in judgment of law immaterial, then the jury have never passed their own judgment upon the materiality of those proofs, and the cause ought to be remanded to another jury. This is the necessary course in such a case. Thus in *Darves v. Pierce*, 2 T. R. 53, 125, evidence was rejected, and a bill of exceptions taken, and the K. B. held the evidence admissible, and a *venire de novo* was awarded, and the judges in that case said that, "as the jury had not exercised any judgment upon the whole of the question it ought to be submitted to them for their consideration, and that when they held that the evidence should have been received, they did not determine that it was conclusive, but only that it ought to have been submitted to the jury, and that what effect it would have upon their minds, it would be impossible to say." That case is analogous to the present one in principle, for whether evidence be rejected, or the jury be charged that in law it is of no avail, amounts to the same thing, as to its effect with the jury.

I have not deemed it necessary to examine, critically, the evidence in the case, in order to determine whether certain facts were material to have been disclosed, because, as I have already attempted to show, that question was for a jury, and is not within the province of this court. I shall only add, that it does not appear to me to be a very clear point, that the evidence withheld from the underwriters was immaterial, and, therefore, as well on account of the importance of that question in this particular case, as on general principles of law, it ought to be submitted to the consideration of a jury. I am, accordingly, of opinion that the judgment of the supreme court be reversed, and that the cause be remanded, with directions that a *venire de novo* be awarded.

A majority of the court being of this opinion, it was thereupon ordered and adjudged, that the judgment of the supreme court be reversed, and that a *venire de novo* be awarded, for the trial of the issue joined between the parties in the said court, and that the costs in this court abide the final decision of the cause.

Judgment of reversal.

VERPLANK v. STERRY.

[12 JOHNSON, 532.]

DELIVERY OF DEED.—A deed may be effectually delivered by words, or acts without words; and the delivery may be either to the grantee or to a third person, without any special authority, for the use of the grantee.

VALIDATING VOIDABLE CONVEYANCE.—A conveyance, voidable on account of fraud or covin, may be made valid and effectual by matter *ex post facto*.

MARRIAGE A VALUABLE CONSIDERATION.—Marriage is a valid consideration; and if the grantee of a voluntary deed gains credit by the conveyance, and a person is thereby induced to marry, such conveyance upon the marriage ceases to be voluntary, and becomes good against a subsequent *bona fide* purchaser for a valuable consideration. And it makes no difference whether any particular marriage was in contemplation at the time of the voluntary settlement, or that the grantee married without the consent of her father, the grantor.

APPEAL from the court of chancery to the court of errors. The respondents filed their bill against the appellant and others, stating that Louisa Ann, one of the respondents, is the daughter of James Arden, by Eliza, his wife, now deceased; that during her last illness, the said Eliza requested her husband to unite in making a provision for their daughters, to which he acceded, and assured her he would never set aside such provision. Pursuant to this, a deed was executed by Arden and wife on the twenty-fifth of November, 1805, to De Witt Clinton and Richard Arden, for the consideration of natural love and affection for the said Louisa Ann. This deed conveyed certain property in New York in trust for the said Louisa Ann. The deed, shortly after its execution, was delivered by the grantors into the hands of the *cestui que trust*, Louisa Ann. The premises conveyed were valued at twenty-five thousand dollars. After the delivery, and before the intermarriage of the respondents, the said Eliza Arden died, August 4, 1806. For a considerable time after the death of the mother, the deed remained in the daughter's possession; but some time in the year 1807, and before the intermarriage of the respondents, James Arden requested the deed to be put in his possession for safe custody, which was done accordingly. After this James Arden re-married, when the respondent Louisa Ann, being apprehensive, urged him to deposit the deed for her with some other person, and he accordingly, on the eighth January, 1809, put it in the possession of Clinton, one of the trustees. The respondent Robert Sterry understood, at the time he

married, that his wife Louisa Ann had an interest in the trust property. The bill charged that James Arden fraudulently conveyed the trust property to Verplank, a relative, who had knowledge of the trust; and that such pretended conveyance was dated in December 11, 1809, and purported to be for a large sum of money, which was fictitious. The bill prayed for a decree establishing the right of the respondents, and for an accounting, and for further relief.

The defendants answered separately. Verplank stated he had heard that Arden had made some provision for his daughters; but the information was vague; and at the time he received his deed, he was not aware that the trust existed; that he bought the property for sixteen thousand dollars. The agreement was made on December 11, 1809, and a deed executed on or about that time, when he had no knowledge of the intermarriage of the respondents; that he had actually paid the whole consideration, and since he has received the rents and profits to his own exclusive use.

James Arden in his answer admitted the execution of the deed to make provision for the daughters; but claimed that the deed remained in his possession until January 9, 1809, when he placed it in the hands of Clinton as stated, stating he should retain the income of the property during his life, and at his death the deed should become operative. He stated that respondents thereafter married without his knowledge, consent, or approbation. He further stated he had received the income to his own use until he conveyed to Verplank. He acknowledged the sale to Verplank, considering himself sole owner. Clinton's answer was substantially the same as that of James Arden. Other material facts as disclosed in the evidence appear from the opinions.

A decree was made in favor of the respondents, from which an appeal was taken.

Baldwin, for the appellants.

Griffin and Riggs, contra.

YATES, J. The first question arising in this cause is as to the execution of the deed of the twenty-fifth of November, 1805, from James Arden and Eliza, his wife, to De Witt Clinton and Richard D. Arden, in trust for Louisa Ann, the daughter of the grantors. From the testimony of one of the subscribing witnesses, who proves the execution of this deed, it does not appear that either of the trustees were present, or

that any condition was mentioned at the time. If it was intended to have been a conditional delivery, it is an unusual departure from the course the grantors ought to have adopted, in omitting to state the condition, if any existed, to the subscribing witnesses. This omission raises a strong presumption against the operation of the deed in any manner different from the purposes expressed in it, and from the unquestionable possession of this deed by the daughter subsequently the inference is irresistible that the delivery was to her, she being immediately interested, and that it took place in the presence of Mrs. Arden, under whose maternal auspices, and at whose particular instance and request the settlement on her daughter was made. It was not necessary for the trustees to be there personally to receive it. In *Tuvis' executor v. Bury*, 8 Dyer, 167 b, a delivery to a third person without speaking of it is the deed of the party, and the deed is held good, and is, in law, the deed of the defendant, before any delivery over to the party, and the refusal of the party cannot undo it, as the deed of the party from the beginning. I do not think this transaction is enveloped in such mystery as not to admit of a satisfactory explanation.

It is unreasonable to suppose that this deed was intended to be subjected to the future control of the husband. It was executed at the instance of Mrs. Arden, during her illness and in contemplation of approaching death, for the express purpose of making a permanent and suitable provision for the support and maintenance of her daughter, and her subsequent declarations show what her intentions and expectations were in relation to the business, which it appears had given her much anxiety and uneasiness before it was done. She expressed to several of the witnesses her satisfaction with her husband's conduct in complying with her wishes, and that she felt easier and better since Mr. Arden had made a settlement on her daughters.

The idea that he intended at the time to deceive the expiring partner of his bosom cannot be indulged for a moment. It appears that he acted openly and decidedly, by leaving the deed in possession of the daughter, in the presence of the mother, to be disposed of as they might think proper. The manner in which he afterwards obtained possession of this deed, is satisfactorily explained by some of the witnesses, and shows decidedly that previous to his taking it from his daughter he had assumed no control over it. Not one of the witnesses who were present when the deed was signed mentions that any condition was stated at the time, and those on the part of the

appellant who give evidence on the subject appear to have collected their information from desultory conversations, at different periods, with members of the family; a species of evidence at all times dangerous to be received to explain the intent, or control the operation of a written instrument even in a court of equity, on the ground of a mistake which, in this case, it is alleged, was made by Abraham Skinner, who drew the deed; but there is no evidence to support the allegation, except the assertion of Arden himself.

If this mistake had actually taken place, it is somewhat extraordinary that the appellant has not availed himself of the benefit of Skinner's testimony to explain it, and still more so that he did not cause it to be rectified, for by the evidence of Richard D. Arden the deed was kept in his father's desk in the office below, until it was taken to his mother's bedroom to be signed. A sufficient length of time therefore must have intervened, after it was drawn and before it was signed, to have enabled him to correct the error. Under these circumstances I do not believe the deed was drawn different from Arden's intentions at the time. But allowing the whole of the testimony to have its due weight on the ground of mistake, the witnesses on the part of the respondents, as to the conversations with Arden, and others of the family, showing a different understanding with regard to the transactions greatly preponderate, so that without noticing the subsequent conduct of Mr. Arden, I think from the facts disclosed by the evidence in the case there remains no ground for reasonable doubt that the deed was perfected at the time, and that he then intended it should operate unconditionally according to the terms of it, and the subsequent delivery of this deed to Mr. Clinton upon the conditions stated at the time, can be of no avail, it can afford him no possible benefit. He had divested himself of the property the moment he executed and delivered the deed in the first instance, and of course retained no authority to give it an operation different from what was contained in it.

A deed cannot be delivered twice; for, if the first delivery has any effect, the second will be void: 8 Cruise's Dig. 29, sect. 59. Nor can this second delivery prevent or limit its operation, if even it is admitted that the deed is voluntary. In 2 Vernon, 473, "A. had made a voluntary settlement of an estate, subject to some annuities, in trust for his grandson and his heirs; and afterwards he makes another voluntary settlement of the same estate, to the use of his eldest son for life, and to his first, etc.

sons in tail, with remainders over, and by will gives a considerable estate to his grandson." Although it was proved that A. always kept the first settlement in his custody, and never published it, and it was, after his death, found amongst waste paper, and the last deed was often mentioned by him, and he told his tenants the plaintiff was to be their landlord after his death, yet the son could not be relieved against the first settlement. In 1 Vernon, 464, the court say, "A settlement, though voluntary, is not revocable."

This deed, then, having been duly executed, and it being evident that its vitality could not be affected by a second delivery a further question remains to be determined, whether its operation can be defeated by the subsequent deed from James Arden, and Ann, his present wife, to the appellant, dated on or about the eleventh of December, 1809. I do not think we are called upon to express an opinion on the question whether a voluntary settlement ought not, according to the words of the statute, to be fraudulent and covinous, and for the purpose and intent to deceive, in order to make it void against a subsequent purchaser. But, from the facts in this case, it will be sufficient, according to my view, to determine whether the first deed is, in fact, a voluntary conveyance, or whether this court are not bound, under the circumstances, to consider it a deed for a valuable consideration. It appears by the declaration of trust contained in it, that a life estate in the premises was given to Louisa Ann Arden; and in case she should die, leaving lawful issue, that then it should be held in trust for the benefit of such issue, etc.

In *Munn v. Wilsmore*, 3 T. R. 529, Lord Kenyon observes, that very small considerations have been holden sufficient to give validity to a deed; when, in framing family settlements, limitations are made in favor of the distant branches of a family, such remainders are not considered as voluntary, if the object of the parties in making the settlement was fair and honest. The case of *Newstead v. Searles*, 1 Atk. 264, supports the same principle. It would seem from those cases that the limitation to distant issue would alone be sufficient consideration to protect this deed; but connect with it the marriage of Sterry, and I think its validity cannot be questioned. Marriage of itself is a sufficient consideration. That Louisa Ann's right to the property forwarded the marriage is evident, because Mr. Sterry, as a discreet and prudent man, must have felt an interest in the future support and maintenance of his family; and the avails of this property towards such support might well have been

contemplated by him. This appears to have been the case, from his conversation with Colonel Hawkins on the subject. Indeed, proper feelings for the comfort as well as happiness of the object of his attachment must have given importance to the immediate possession of this property; it therefore operated as an inducement to the connection. This marriage took place on the eleventh of December, 1809, and the deed to Verplank was executed between the eleventh and fourteenth of the same month, so that the marriage must, at all events, have been solemnized before the deed existed.

Sugden, in his *Law of Vendors*, in treating on voluntary settlements, page 437, says: "If a voluntary grantee gain credit by the conveyance to him, and a person is induced to marry him on account of such provision, the deed though void in its creation as to purchasers, will, on the marriage being solemnized, no longer remain voluntary, as it was in its creation, but will be considered as made upon a valuable consideration. This principle is recognized in *Brown v. Carter*, 5 Ves. jun. 862, and by Lord Ellenborough in the case of *Olley v. Manning*, 9 East, 69.

If this it is even admitted that the conveyance of the twenty-fifth of November, 1805, to Messrs. Clinton & Arden was voluntary in its creation, it is evident it assumed a different character in consequence of the marriage, as that alone must be deemed a valuable consideration, which gave it a validity not to be affected by the subsequent deed to the appellant. The chancellor's decree being founded upon the validity and operations of this deed, my opinion is, that the same ought to be affirmed.

SPENCER, J. The first point which claims the consideration of the court is, whether the deed from James Arden to Louisa Ann, his daughter, was so far legally and duly executed on the twenty-fifth of November, 1805, as between the parties to the deed to divest the grantor of all his estate and interest in the premises granted thereby. James Arden, by his answer, admits that shortly after the time the deed bears date (twenty-fifth of November, 1805), he signed and sealed it; and believes that he and his wife may have used the formal words of delivery; but he insists that the deed remained in his possession and power, thenceforth, until on or about the ninth of January, 1809, when, to relieve the apprehensions entertained by his daughter, that in case of his death it might be lost or destroyed, he placed the same in the hands of De Witt Clinton, one of the trustees, for her benefit,

with certain conditions accompanying such tradition, viz., that the income of the property should come to him during his life, and that if his daughter married without his consent or approbation, then the deed should not operate. The proofs in the case, in my judgment, are decisive that the deed was legally and effectually executed, so as to become operative on the twenty-fifth of November, 1805, notwithstanding the denial and answer of Arden.

Mrs. Braine was present at the execution of the deed. She proves that it was read over by Arden, and that thereupon it was executed in the bedroom of Mrs. Arden. That being very intimate with Arden's daughter, and very frequently with them, she saw the deeds in their bedroom; that on one occasion she heard her cousins read over their deed; that on a particular occasion James Arden came into their bedroom, and seeing the deeds lying on the projection of a bookcase, or wardrobe, he reproached them with carelessness, and with their consent took the deeds into his own keeping. Mrs. Servant confirms all the material facts deposed by Mrs. Braine, relative to the custody of the deeds by her and her sister, and their being taken by her father for safe keeping. Robert J. Livingston proves that Louisa Ann had the custody of the deed given to her; that on a particular occasion she produced it to him, and that he read it and now identifies it.

That Mr. Arden intended the two houses in Greenwich street for his daughters, appears by the testimony of William Edgar. And that he had in his own opinion divested himself in favor of his daughters of these houses, is proved by Mrs. Talbot, who states, that shortly after the death of Mrs. Arden, as she was walking in Greenwich street, she met Mr. Arden, when Mrs. Talbot, pointing to the houses, asked if those were his, to which he answered, "my daughters' houses, madam," and then said his daughters would be good fortunes. The fact admitted by Arden's answer, that he may have used the formal words of delivery confirmed by the testimony of one of the subscribing witnesses, Mr. Hamilton, who proves the execution of the deed, taken in connection with the fact that the deeds were for some time in the custody of the *cestui que trust*, Louisa Ann, and the total absence of all proof impeaching the force of these facts, can leave no doubt on the mind that Arden not only intended an effectual execution of the deed, but that every legal formality was complied with. A deed is available if delivered to the party grantee, or even to a stranger, without special

authority, if intended for the use of the grantee, and a deed may be delivered by words or by deeds without words: Shep. Touch. 58, and cases cited. The subsequent tradition of the deed to Mr. Clinton, if it became operative before, can have no effect, nor was it in the power of Mr. Arden to impose any condition upon a grant which had already become effectual. The appellant has entirely failed to show that any fraud or mistake intervened in drawing the deed. The suggestion is altogether without support, excepting from his own allegations. It is therefore useless to inquire how far a deed can be impugned by the admission of parol evidence. Admitting for the present that the deed from Mr. Arden to his daughter, Mrs. Sterry, was liable to be defeated by a subsequent deed, on the ground that it was voluntary, and in a legal point of view fraudulent as against subsequent *bona fide* purchasers for a valuable consideration, we are then to inquire what operation the marriage between the respondents had in reference to the deed.

It is an undeniable proposition that a deed, voidable, may be rendered valid and effectual by matter *ex post facto*. If a man makes a feoffment by covin, or without any valuable consideration, and the feoffee makes a feoffment for valuable consideration, and then the first feoffer enters and makes a feoffment for valuable consideration also, the feoffee of the first feoffer shall hold the lands: Sugden Law of Vendors, 436, 437, and cases there cited. So if a voluntary grantee gain credit by the conveyance, and a person is induced to marry her on account of such provision, the deed, if even voidable as to purchasers, will, on the marriage being solemnized, no longer remain voluntary, as it was in its creation, but will be considered as made upon valuable consideration: Sugden, 437, and the cases there cited. Upon this point the decisions are numerous, and I have not met with a single case or *dictum* to the contrary. Blackstone very correctly defines (2 Bl. Com. 297) a valuable consideration to be money, marriage or the like, and he observes, the law esteems them an equivalent given for the grant. The facts in this case prove undeniably that the marriage between the respondents preceded the deed from Arden to the appellant, and that the marriage itself was induced by the provision secured to Mrs. Sterry by the deed in question. It was not necessary to the validity of the marriage or to any of the consequences following from it, that Mr. Arden should have given his consent to it.

It would be unnecessary to proceed further, to entitle the

respondents to an affirmance of the decree of the court of chancery, nor was it absolutely necessary for the court below to go into the consideration of the question, how far forth the deed from Arden to his daughter would have been available to her, had not the marriage between the respondents intervened. The chancellor has seen fit to discuss and decide that point, and I do not mean to insinuate that in doing so, he had at all traveled out of the record. The case fairly presented the question, and he has promptly decided it. Believing his decision incorrect in this particular, I think this court is bound also to express its opinion. Under the circumstances of the case to give the question the go by would be a silent acquiescence in the opinion delivered in the court below. The point has been fully and ably argued, and it may save great expense and future litigation to settle it finally.

It is contended that the deed to Mrs. Sterry having been voluntary, and without any other consideration than that of blood and natural affection, it was in the power of the grantor, by a subsequent deed founded on a valuable consideration of money, to defeat the operation of the first deed in favor of the second alienee, although such second alienee knew of the existence of the first deed, and although, in point of fact, there was no original intent with either of the parties to the first deed to defraud any subsequent purchaser. In the present case his honor, the chancellor, is of the opinion that the appellant is chargeable with constructive notice of the deed of the twenty-fifth of November, 1805, to Mrs. Sterry. It may well be questioned whether this conclusion is warranted by the facts. We have no other proof of the constructive notice than the admissions of the appellant in his answer. He admits he had heard, before the delivery of the deed to him, that Arden had made some provision by deed, or otherwise, for his daughter, of property in Greenwich street. This information is loose and inexplicit, and I cannot say that I am satisfied that it was equivalent to direct notice. It is not very important, however, whether it was so or not.

Our statute for the prevention of frauds had adopted, *totidem verbis*, the statutes of 13 Eliz., ch. 5, and 27 Eliz., ch. 4. The former declares void all gifts and conveyances of lands, tenements, hereditaments, goods and chattels, had or made, devised or continued of malice, fraud, covin, collusion or guile to the end, purpose or intent to delay, hinder or defraud creditors and others of their just debts, etc. The latter declares void every

conveyance, etc., of any lands, tenements, hereditaments, to be had or made for the intent and purpose to defraud and deceive such person as shall purchase the lands, etc., so before conveyed. Both statutes leave the conveyances and gifts as good between the parties and their representatives. The 13 Eliz. avoids the covinous act in favor of creditors. The 27 Eliz. avoids it in favor of subsequent purchasers for money or other good consideration. The fourth section of our statute, in conformity with the 13 and 27 Eliz., inflicts a penalty and forfeiture of one year's value of the lands upon the party to such fraudulent transaction, who shall maintain or defend the fraudulent deeds or conveyances, pronounced void by those statutes. The sixth section of our statute adopts the proviso to the 27 Eliz., and saves from the operation of the statute conveyances made upon good consideration and *bona fide*. If the statute of the 27 Eliz. was now, for the first time to receive a construction, it does seem to me impossible that it should be held to embrace within its purview the case under consideration.

Mr. Arden, as we must believe, was in 1805, a man of a handsome and unincumbered fortune. In compliance with the earnest desire of his then wife, he deliberately sits down to make a suitable provision for his two daughters, and their issue. The transaction is open, public and notorious. No one can believe that it entered into the hearts or heads of the father or his daughters, that the deeds he was executing were with the intent or for the purpose of defrauding and deceiving such person as should thereafter purchase the estate thus conveyed; yet this court is called upon to consider these deeds as void, on the ground of an original covinous, guileful and fraudulent design, coeval with the transaction between the father and daughters. It would be with extreme reluctance that I should consent to brand as innocent and pure a transaction as ever took place with the odious and detestable crime of fraud. There may be cases in which a common error may have been matured into a right, and then the error must be submitted as the lesser evil. The construction of statutes belongs to the courts of law and equity, and if a construction has been adopted by the courts and confirmed in the one of *dernier resort*; and more especially if the public act on the erroneous construction, justice and policy concur in requiring that the error be adhered to, or otherwise no man could be safe in his dealings. The adjudications which have taken place in England since the nineteenth of April, 1775, form no part of the common law of this state. If since

that period cases have occurred overruling the anterior decisions, the courts of this state can pay no other respect to them than as the reasonings of learned and eminent men. They can have no more influence on our decisions than the lucubrations of jurists.

The cases which we met with prior to the above period, and which have turned upon the construction of the 27 Eliz., are not in harmony, though I think the preponderance, in weight and number, is decidedly adverse to the doctrine which now prevails in the courts of Westminster Hall.

Lord Ellenborough, in delivering the opinion of the court of King's Bench in *Doe v. Manning*, 9 East, 68, has collected the cases. He states that in the cases which arose nearest the time of passing the statute, the judges seem to have thought that a voluntary settlement was only *prima facie* fraudulent against a purchaser. By a reference to the cases it will appear that it was matter of evidence to the jury, on which they passed, whether a voluntary conveyance, as such, was fraudulent. There are very great names in support of this doctrine, among which may be mentioned Lord Hale, Lord Rolle, Chief Baron Gilbert, and Chief Justice Eyre. Baron Gilbert is extremely perspicuous and clear in his observations, and I cannot pass them by without notice. "A voluntary conveyance," he says, "hath no badge of fraud unless the party were then in debt, or in treaty for a sale of the lands; for a man may have reason to settle his estate for the good of his wife and children, and if he hath a clear estate, and no intention to sell, the settlement must be taken to be a good one, for that cannot lie under a suspicion when there is no discovery made of an intent to use that settlement to fraudulent purposes at the time of making it:" *Gilb. Ev. by Lofft.* 807.

There are undoubtedly very great names who have held a contrary doctrine, that conveyances merely voluntary are voidable at law by a subsequent purchaser for valuable consideration, and among these may be ranked Lord Hardwicke, Chief Justice DeGrey and several others. Lord Mansfield undoubtedly maintains the doctrine inculcated by the judges who lived nearest the passing of the statute of 27 Eliz.; and Lord Ellenborough, in his opinion in the case cited, does not present the opinion of this eminent judge in the strong point of view it merited, in the case of *Doe v. Rutledge*, Cowp. 713. He divides the argument he there delivered into four heads, and he especially considers whether the deed of 1763, a voluntary deed, with no

other consideration than that of blood for its support, was a fraudulent, covinous deed within the true intent and meaning of the statute. He gives a distinct consideration to the question whether the subsequent purchaser was such a one as was entitled to object to the voluntary deed. In commenting on the voluntary deed of 1763, he observes that the 27th of Eliz. contains not a word impeaching voluntary settlements merely as being voluntary, but as fraudulent and covinous. He notices the title of the statute and the enacting part, as making provisions against such practices as if they were a crime. He gives a criterion of determining each case: "One great circumstance," he says, "which should always be attended to in these transactions is, whether the person was indebted at the time he made the settlement; if he was it is a strong badge of fraud." The learned editor of Sir Wm. Blackstone's commentaries (Mr. Christian), understands Lord Mansfield in the manner I have done: 2 Bl. Com. 297, n. 1.

In *Doe v. Manning*, 9 East, 71, Lord Ellenborough concludes thus: "And we cannot but say, as at present advised and considering the construction put on the statute, that it would have been better if the statute had avoided conveyances only against purchasers for valuable consideration, without notice of the prior conveyance." In *Evelyn v. Templar*, 2 Bro. C. C. 149, Lord Thurlow said, "That although it would have been as well at first if the voluntary conveyance had not been thought so little of, yet the rule was such, and so many estates stand upon it that it cannot be shaken." In *Doe v. Martyr*, Sir. J. Mansfield, C. J., regretted that it had ever been decided that even notice of the prior settlement would not defeat a subsequent purchase. It is a sound and settled principle, that notice to a purchaser of a prior fraudulent deed, will not affect the subsequent purchaser, and that such subsequent purchaser may avail himself of the fraud in the first deed. And the reason of this is solid, because if he knew the transaction, he knew it was void by law. But to extend this principle to voluntary deeds made by a father as a provision for his children; made, too, by a father not indebted at the time, and with every act of publicity usually attending the conveyance of an estate, would be, in my judgment, to beg the very question in controversy.

Legal inductions are very properly and necessarily drawn from legal analogies, and in this view let us examine the constructions which courts of law and equity have given to the 13 Eliz. It is perfectly well settled that to impeach a voluntary

settlement made on a meritorious consideration, it is necessary that the seller should not only be indebted, but should be insolvent, or in doubtful circumstances at the time. The 13 Eliz. was intended to prevent the conveyance of property with a design to defraud creditors. If the person making a settlement is insolvent, or in doubtful circumstances, the settlement depriving his creditors of the means of satisfying their debts, comes within the statute. But if the grantor be not indebted to such a degree as that the settlement will deprive the creditors of an ample fund for the payment of their debts, the consideration of natural love and affection will support the deed, although a voluntary one against his creditors; for in the language of the decisions it is free from the imputation of fraud. Lord Hardwicke is very full and explicit on this point. In *Twmsend v. Windham*, 2 Ves. 11, he said: "If there is a voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards become indebted, if that voluntary conveyance was for a child, and no particular badge of fraud to deceive or defraud subsequent creditors, that will do." See, also, 2 Bro. C. C. 90; 5 Ves. 384. Both the statutes, the 13 and 27 Eliz. contain the general proviso annexed to our statute, excepting from their operation those deeds only which are *bona fide*, and upon good consideration, and it is very clear that Lord Hardwicke, in the opinion just cited, lays stress on the circumstance that the voluntary conveyance was for a child.

The deed from Arden to Mrs. Sterry has these two circumstances: it was *bona fide*, and it had a good consideration; that of love and natural affection, and I have no doubt that this deed is saved by the express proviso of the statute. The question naturally occurs, can the late decisions in the English courts on the two statutes of the 13 and 27 Eliz. be reconciled by the principles of just construction? Under the former, a man out of debt may make a settlement upon his child, and if he afterwards becomes indebted, the subsequent creditor cannot impeach the gift, because it was not made to deceive or defraud him, nor any one else, and, therefore, is not within the statute. How, then, can it be maintained that, if the same father, in consideration of blood, make a *bona fide* settlement on his child, at a time when he is not indebted, this transaction shall be deemed void, and that it shall be taken for granted, contrary to the real truth and fact, that it was with intent to deceive such person as should afterwards purchase the estate,

even with full notice of the *bona fide* conveyance? As well might it be said that a settlement on a child is void as to future purchasers. The settled and decided and uniform construction on the 13 Eliz. is entirely opposed to the late English decisions on the 27 Eliz., and it would be extremely absurd to adhere to both. It is manifest to me, not only from the regret expressed by the judges and chancellors in England that such a construction had taken place in regard to the 27 Eliz., but from the evident discrepancy in the constructions of the two statutes that the latter decisions have been influenced by a sort of judicial expediency, rather than an adherence to the meaning or wording of the statute of the 27 Eliz. It was to avoid the unsettling of estates. Now we are not in that predicament, we can give a rational and true construction to the act, without doing violence to the meaning of the legislature, or our own consciences, or unsettling estates.

If any other consideration was necessary, to bring us to this result, it would be found in the fourth section of our act, which is also copied from the two English statutes. By that section a penalty of one year's value of the premises is imposed for maintaining or defending covinous or fraudulent conveyances. If a subsequent purchaser, with notice, can set aside a deed like the one under consideration, it must be on the ground that the anterior deed is fraudulent, and thus a transaction, which no one can doubt to have been fair and *bona fide*, is to be considered criminal and punished as a fraud. This would be quite contrary to another part of Lord Mansfield's opinion, in *Doe v. Rutledge*, "that no person making a voluntary settlement by way of provision for his family was ever considered in that criminal light." It has been already observed, that the statute excepts from its operation deeds made on good consideration and *bona fide*. A settlement may in its origin have both these requisites, and yet may become fraudulently, and kept on foot against good faith. "If a fraudulent use is made of a settlement, that indeed," said Lord Mansfield in *Doe v. Rutledge*, "may be carried back to the time when the fraud commenced." And I am free to admit, that but for the intervention of the marriage between the respondents, prior to the deed to the appellant, as the proofs stand before us, the appellant must have prevailed. Arden's continuance in the possession of the property, his receipts of the rents and profits, and above all, the ignorance of the appellant that he had made the settlement, would, as respects him, have been strong circumstances that a fraudu-

lent use had been made of the deed of settlement, and would have contaminated it. On the other hand, if the appellant had notice of the deed of settlement, the possession of the property by Arden, and his receipt of the rents and profits, would not have been badges of fraud, and would not have misled him, and in that case he would not, in my estimation, have been a *bona fide* purchaser, entitled to set aside the settlement.

In affirming this decree, I proceed entirely on the ground that the marriage between the respondents furnished a valuable consideration to the voluntary deed from Mr. Arden to his daughter, Mrs. Sterry, *ex post facto*, and that as against the appellant, the deed ceased to be a voluntary one, for good consideration merely.

In my opinion the decree of his honor, the chancellor, ought to be affirmed.

Such being the unanimous opinion of the court, it was thereupon ordered, adjudged and decreed that the decree of the court of chancery be affirmed, with costs, to be taxed, etc.; and that the record be remitted, etc.

Judgment of affirmance.

In *Babcock v. Eckler*, 24 N. Y. 623, the doctrine in New York regarding voluntary conveyances which are regarded fraudulent, is stated; and Sutherland, J., refers to the opinion of Spencer, J., in the principal case. Here it is decided that mere indebtedness will not of itself defeat a voluntary conveyance; there must be a fraudulent intent, and this intent is a fact to be found by the jury, as declared in the revised statutes. And the same doctrine is held in *Dunlap v. Hawkins*, 59 N. Y. 340, where the principal case and others are cited.

A late decision in Virginia, by Staples, J., in *Herring v. Wickham*, 29 Gratt. 628, contains an admirable statement of the law on the subject of voluntary conveyances, and the nature of marriage as a valuable consideration. Here it was decided: If the grantee in a deed be a *bona fide* purchaser for a valuable consideration, his or her title is unassailable, whatever may have been the motives or intentions of the grantor in executing the deed. It is absolutely essential that both parties shall concur in the fraud, to invalidate the deed. Fraud cannot be presumed; it must be proved by clear and satisfactory evidence. Marriage is a valuable consideration sufficient to support a conveyance of property even against creditors; and in such a case the wife is deemed a purchaser of the property settled on her in consideration of the marriage, and is entitled to hold it against the world. However much a man may be indebted, an antenuptial settlement, made by him in consideration of marriage, is good against his creditors, unless it appears that the intended wife was cognizant of the fraud.

Considering the nature of marriage as a consideration, the opinion proceeds: "In the first place, that marriage is a valuable consideration, sufficient to support a conveyance of property even against creditors, is firmly established by a long train of decisions, English and American. The wife, in such case, is deemed to be a purchaser of the property settled on her in consideration of the marriage, and she is entitled to hold it against all the world. Lord Coke

gives a forcible illustration of the rule. It being the general doctrine that the word 'heirs' is necessary in a deed to pass a fee, if, he says, 'a man had given land to a man with his daughter in frank marriage, generally a fee-simple had passed without this word 'heirs;' for there is no consideration so much respected in law as the consideration of marriage in respect of alliance and posterity:' 1 Bishop's Law of Married Women, sec. 775. In *Barrow v. Barrow*, 2 Dickens, 504, lord chancellor said: 'he never knew an instance where a settlement in consideration of marriage had been set aside, and he would not make a precedent.' In *Campion v. Cotton*, 17 Ves. 264, 267, Sir Samuel Romilly and William Bell, counsel for the defendants, said: 'There is no decision to be found in which a settlement previous to and in contemplation of marriage has been considered as fraudulent against creditors.' That a case strong enough for that purpose might exist cannot be denied; as, if the wife was clearly a party, and the marriage a more secure mode of defrauding creditors; but no such decision has yet been made. See also *Nairne v. Prouce*, 6 Ves. 752; *Tunno v. Trezevant*, 2 Desaus. 264. There are modern English decisions which have pronounced such settlements void as to creditors, not, however, because they included all the husband's property, or because he was utterly insolvent, but on the ground that the wife appeared to be a party to the fraud of the husband: *Ex parte McBarnie's Trustees*, 1 DeG. M. & G. 440; *Fraser v. Thompson*, 4 DeG. & Jones, 659. The learned counsel quotes an observation of Mr. Justice Nott of South Carolina, that the English decisions on this subject ought to be received with great caution; that there marriage settlements are usually among the higher classes of society, with whom the marriage contract is in the nature of a bargain and sale, usually carried on by parents and guardians, to promote family pride and influence."

After a reference to the views of Lord Robertson in the *Case of Levett*, Ferg. 385, 389, regarding the nature of the marriage contract, the opinion proceeds: "It is upon some such considerations as these, I take it, and not those suggested in this case, the courts everywhere have based their decisions in respect of marriages, and contracts in consideration of marriage. And accordingly the American decisions have followed the English, adopting the language, and affirming in the broadest terms the doctrines of the judges. *Magniac v. Thompson*, decided by Mr. Justice Baldwin, and reported in 1 Baldwin, 344, and again decided upon appeal to the supreme court of the United States, 7 Peters, 367, is a familiar case much relied on in the argument here. Mr. Justice Story, delivering the opinion of the whole court, said: 'Nothing can be clearer, both upon principle and authority, than the doctrine, that to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intended a fraud, and the other party have no notice of it, she is not and cannot be affected by it. Marriage in contemplation of the law is not only a valuable consideration to support such a settlement, but a consideration of the highest value, and from motives of the soundest policy, is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration, and so that it is *bona fide* without notice of fraud brought home to both sides, it becomes unimpeachable by creditors.' In *Sterry v. Arden*, 1 Johns. Ch. 260, 271, Chancellor Kent said: 'The marriage was a valuable consideration which fixed the interest in the grantee against all the world, and as much as if she had then paid an adequate pecuniary consideration. It is the constant language of the books and of the courts, that a voluntary deed is made good by a subsequent marriage, and a

marriage has always been held to be the highest consideration in law: See *Verplank v. Sterry*, 12 Johns. 536, where this decision was affirmed. The cases of *Smith v. Allen*, 5 Allen, 454; *Jones' Appeal*, 62 Pa. St. 324; *Bunuel v. Witherow*, 29 Ind. 123; *Armfield v. Armfield*, Freeman Ch. 311; *Andrews v. Jones*, 10 Ala. 400, are to the same effect. See also 2 Minor's Inst. 690, 706; 1 Amer. Lead. Cas. 54, 55; Bump on Fraud. Conveyances.'"

PEOPLE v. HERRICK.

[18 JOHNSON, 82.]

QUESTIONS WITNESS NEED NOT ANSWER.—A witness either on the *voir dire* or on cross examination is not bound to answer any question which would subject him to punishment, or render him infamous or disgraced. **RECORD OF CONVICTION OF WITNESS.**—The party who would take advantage of the exception that a witness has been convicted of the *crimes falsi* must have a copy of the record of conviction ready to produce in court.

INDICTMENT for grand larceny, charging the defendant with having stolen certain handkerchiefs, pillow cases, shirts, etc. On the trial evidence was produced to show that one of the handkerchiefs and a pillow case were found in the prisoner's possession. The prisoner then offered one Hardy to testify that he had seen the prisoner purchase these articles, and pay for them, from a party who had since absconded. This witness was then asked by the public prosecutor whether he, the witness, had not been convicted of petit larceny, and whether he was not then in confinement under that conviction. This question was objected to, but being admitted and being answered in the affirmative, the witness was declared incompetent. The prisoner was thereupon convicted; but judgment was delayed in order to obtain the opinion of this court upon the admissibility of the question objected to.

By Court, SPENCER, J. If the witness was not bound to answer the question, he ought not to have been compelled to do so; and being excluded, and the defendant deprived of the benefit of his testimony, the conviction was illegal. Mr. Peake, in his *Treatise on Evidence*, 129, 130, in considering whether a witness is bound to answer a question, either rendering him infamous or disgracing him, says that a practice of putting such questions, and requiring them to be answered, had continued for a long time without objection, but that some of the judges had lately thought that neither convenience nor authority justify this mode of examination; and he admits that the highest and most enlightened characters in the profession are

much divided on this point, and that the question was then undetermined. In *Priddle's case*, Leach's Cr. L. 382, old edition, he was examined before Mr. Justice Buller, when called as a witness, and was asked, as it would appear, without objection, whether he had not been convicted of a conspiracy and sentenced to be imprisoned in Newgate for two years, and on his answering in the affirmative he was rejected. In *The King v. Edwards*, 4 T. R. 440, on an application to bail the prisoner, one of the bail was asked whether he had not stood in the pillory for perjury; the question was objected to as tending to criminate him; the court overruled the objection, saying there was no impropriety in the question, as the answer could not subject him to any punishment.

There are no other cases in the English courts, which I have been able to meet with, affirming the right to examine a witness on *voire dire* as to his own turpitude or criminality. I mean questions the answers to which directly implicate the witness in a crime. There is no pretense for saying that it ever was decided that a witness is obliged to answer questions which would subject him to punishments, pains, penalties, or infamy. The ground of the decision in *The King v. Edwards*, is, that the witness having been convicted and punished, he did not, by answering the question, subject himself to any punishment; and the same observation is applicable to *Priddle's case*. There are many authorities which go strongly to uphold the contrary doctrine, that a witness is not bound to answer questions which prove that he has been convicted of the *crimen falsi*. In *Cooke's case*, 4 State Trials, 748; Salk. 153, Ch. J. Treby said, and the other judges concurred: "Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petit larceny, but they have not been obliged to answer; for, though their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy; and if it be an infamous thing, that is enough to preserve a man from being bound to answer." It is laid down as an axiom by almost all the writers on evidence, that the party who would take advantage of the exception, that a witness has been convicted of the *crimen falsi*, must have a copy of the record of conviction ready to produce in court: Buller's N. P. 292; Gilb. Law of Ev., old ed. 102; Comyns's Dig. *Testmoigne* (A. 5); 1 Hawk tit. Ev. ch. 46, s. 104, and the cases there cited.

Since the observations in Peake's text, the case of *The King*

v. *The Inhabitants of Castell Careinion*, 8 East, 77, has occurred; and there Lord Ellenborough, with the concurrence of all the judges, decided that a witness could not be called on to testify that he had been convicted of larceny, and punished. His lordship says: "Whether or not the witness were convicted of felony, would appear by the record; and it cannot be seriously argued that a record can be proved by the admission of any witness. He may have mistaken what passed in court; this can only be known by the record, and there is no authority for admitting parol evidence of it." It may be said that a witness may be introduced unexpectedly, and that a party may be surprised so far as not to have the record of conviction ready to produce. This is very probable, but other things are to be considered than the convenience or interest of parties. It is against a fundamental principle that a party shall accuse himself, and propagate, to the remotest period, his own infamy. The declaration of the party is not the best evidence of which the case is susceptible; and it may be the fact that the party himself mistakes the nature of his offense; for we perceive that conspiracy, and even barratry, will exclude a person from testifying; the infamy of the crime, and not the nature of the punishment, working the incapacity.

But the hardship of excluding such questions is imaginary. If the witness has been convicted of an infamous crime, his character is lost; and it is not to be supposed there are not witnesses, within the reach of the party, to prove the character of the witness. If the offense has been committed long before, and the witness, by his good conduct, has regained his standing in society, then it affords no regret that the party objecting to his competency has not the record of his conviction. On authority and the fitness of the rule, we are of opinion that the proceedings in the court below are erroneous, on the ground that the witness, Hardy, was excluded from testifying.

The doctrine of this case is referred to with approval in *The People v. Gray*, 25 Wend. 467; *Matter of Real*, 55 Barb. 186; *Newcomb v. Griswold*, 24 N. Y. 301; *Schifer v. Pruden*, 64 Id. 52; and in *Blaufus v. People*, 69 Id. 110. In this latter citation, Folger, J., in delivering the opinion of the court, says that the principal case "is always considered an authority to this point," that is, to the point that the record of the conviction must be produced in order to disqualify a witness on account of crime. Greenleaf in his first volume on Evidence, secs. 375, 457, also cites this case.

JENNINGS v. CAMP.

[13 JOHNSON, 94.]

ACTION ON ENTIRE CONTRACT.—Where a contract is entire, a full performance is a condition precedent to the plaintiff's right of action.

RECOVERY ON A QUANTUM MERUIT.—Where a party enters into a contract and performs part of it, and then, without cause, or the agreement or fault of the other party, but of his own mere volition, abandons the performance, he cannot maintain an action on an implied *assumpsit*, for the labor actually performed.

ERROR to the common pleas. The declaration was in *assumpsit*, and contained two counts: the first upon an agreement between Camp, the plaintiff below, and Jennings, by which Camp agreed to log up, burn, and clear, fit for sowing certain lands belonging to the defendant below, before a stated time, and to fence the land with good rail within a stated other period, for which Jennings agreed to pay at a certain rate per acre, and then averred performance; the second count was upon an *indebitatus assumpsit*. Plea, the general issue. The jury found a special verdict, setting out the agreement, and that Camp, "of his own accord, default, and negligence, and without any fault, default or consent of the defendant," after partly clearing the land, did abandon all further proceedings towards fulfilling his contract, and did not finish what he undertook to perform; and submitted whether it was competent for the plaintiff to put an end to his contract and recover for work and labor performed. Damages were assessed on the second count, and judgment given for the plaintiff. The cause was submitted to this court without argument.

By Court, SPENCER, J. This case does not present the question, whether, on a failure to prove the special contract, in consequence of a variance between the declaration and the proof, the plaintiff may not resort to the general count; but the point is, whether a party who enters into a contract, and performs part of it, and then without cause, or the agreement or fault of the other party, but of his own mere volition, abandons the performance, can maintain an action on an implied *assumpsit* for the labor actually performed; and it seems to me that the mere statement of the case shows the illegality and injustice of the claim.

There are two principles which are considered well established precluding the plaintiff below from recovering: 1. The contract is open between the parties, and still in force; the de-

fendant below has done no act to dissolve or rescind it: and it was decided in *Raymond v. Bernard*, 12 Johns. 274 [*ante*, 317], upon a review of all the cases, that if the special agreement was still in force, the plaintiff could not resort to the general counts; 2. The contract being entire, performance by the plaintiff below, was a condition precedent, and he was bound to show a full and substantial performance of his part of the contract. This was so decided in *McMillan v. Vanderlip*, 12 Johns. 166, [*ante*, 299]. In *Cutter v. Powell*, 6 T. & R. 320, a sailor hired for a voyage, took a promissory note from his employer for thirty guineas, provided he proceeded, continued and did his duty as second mate from Kingston to Liverpool. Before the arrival of the ship, he died; and the court held that wages could not be recovered either on the contract or on a *quantum meruit*. The decision was founded on common law principles. Lord Kenyon said that where the parties have come to an express contract, none can be implied, has prevailed so long as to be reduced to an axiom in the law. Ashhurst, J., very pertinently observed, this is a written contract, and speaks for itself; and as it is entire, and as the defendant's promise depends on a condition precedent, to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it; that the plaintiff had no right to desert the agreement, and recover on a *quantum meruit*, for wherever there is an express contract, the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage.

The case of *Faxon v. Mansfield*, 2 Mass. 147, is directly in point. Mansfield agreed with Holbrook to erect and finish a barn by a fixed day, when he was to receive four hundred dollars in full compensation; he performed part of the work, and left it unfinished, without the consent, and contrary to the wishes of Holbrook. Parsons, C. J., in giving the opinion of the court, said on these facts Mansfield could maintain no action either on his contract or on a *quantum meruit* against Holbrook: his failure arising not from inevitable accident, but his own neglect.

In *Whiting v. Sullivan*, 7 Mass. 109, Parsons, C. J., said: "As the law will not imply a promise where there was an express promise, so the law will not imply a promise of any person against his own express declaration."

In *Linningdale v. Livingston*, 10 Johns. 36, we recognized a position in Buller's N. P., that if there be a special agreement,

and the work be done, but not in pursuance of it, the plaintiff may recover upon a *quantum meruit*; for otherwise he would not be able to recover at all." This observation has misled the court below. Correctly understood, it has no application here. It supposes a performance of the contract, with variations from the agreement, probably with the assent of both parties, or it may mean an extension of the time within which the agreement was to be performed with the like assent. The position never was intended to embrace the case of a willful dereliction of the contract when partly executed by one of the parties, without the assent and against the will of the other.

Judgment reversed.

Upon the point that where there is a subsisting special contract between the parties, the remedy is upon the contract and not upon the common counts in *assumpsit*, see this case cited in *Latus v. Seymour*, 24 Wend. 63; *Galeis v. Prentice*, 45 N. Y. 165; *Stark v. Parker*, 2 Pick. 274.

In *Pullman v. Corning*, 9 N. Y. 96, an action to recover the price agreed to be paid for the erection of a house for the defendant by the plaintiff, in a workmanlike manner, within a specified time, Johnson, J., refers to the principal case as favorable to the defendant's position, and said in conclusion: "We are of opinion that no recovery can be had for work done under a special contract, where the work has neither been accepted, nor a faithful, skillful and workmanlike performance of it waived, unless the party seeking to recover can show a performance of the contract." See also *Champlin v. Rowley*, 13 Wend. 187, 196 (n.); *Smith v. Brady*, 17 N. Y. 185. The same principle is reaffirmed in *Tipton v. Feitner*, 20 Id. 429, citing, among other cases, *Jennings v. Camp*.

See *McMillan v. Vanderlip*, *ante*, and 299, note.

PAIN v. PACKARD.

[12 JOHNSON, 174.]

NEGLECTED RELEASING SURETY.—If the holder of a security payable on demand, is requested by the surety to proceed without delay and collect the money from the principal, who is then solvent, but neglects so to do, and the principal afterwards becomes insolvent and absconds, the surety will be exonerated.

ASSUMPSIT on a promissory note made by Packard & Munson, in which Packard alone was arrested, the other defendant not being found. Plea, *non-assumpsit*, and that he signed the note, which was payable on demand, as surety for Munson, and had urged the plaintiff to proceed immediately to collect the amount of the note from Munson, who was then solvent, but that plaintiff, although he might have then collected the same had he taken proper measures, neglected to do so until Munson had become

insolvent and had absconded, rendering it impossible for the plaintiff to collect the money of him. A third plea was similar to the second.

A demurrer to the second and third pleas was submitted without argument.

By Court. The facts set forth in the plea are admitted by the demurrer. The principles laid down in the case of *The People v. Jansen*, 7 Johns. 336 [5 Am. Dec. 275], will warrant and support this plea. We there say a mere delay in calling on the principal will not discharge the surety. The same principle was fully and explicitly laid down by the court in the case of *Tallmadge v. Brush* (not reported). But this is not such a case. Here is a special request by the surety to proceed to collect the money from the principal; and an averment of the loss of the money, as against the principal, in consequence of such neglect. The averments and facts stated in the plea are not repugnant or contradictory to the terms of the note. The suit here is by the payee against the makers. The fact of Packard having been security only is fairly to be presumed to have been known to the plaintiff. He was in law and equity, therefore, bound to use due diligence against the principal in order to exonerate the surety. This he has not done. There can be no substantial objections against such a plea. It may be said the surety might have paid the note and prosecuted the principal; but although he might have done so, he was not bound to do it. If he had a right to expedite the plaintiff in proceeding against the principal, and chose to rest on that, he might do so. In the case of the *Trent Nav. Co. v. Harley*, 10 East, 34, the plea was similar to the present, and not demurred to. The defendant, must, accordingly, have judgment upon the demurrer.

Judgment for defendants.

Folger, J., delivering the opinion of the court in *Colgrove v. Tallman*, 67 N. Y. 99, says: "It is the settled law of this state, and one of the rules of the relations of creditor, principal debtor and surety, that the surety, while the principal is solvent and can be made to pay the debt, may require of the creditor that he collect it of the principal, and if the creditor refuses or neglects so to do, and the principal becomes insolvent and unable to pay, the creditor may not then have his debt of the surety; it is expressly so declared in *Pain v. Packard*, 13 Johns. 174; *King v. Baldwin*, 17 Id. 384; *Remsen v. Beekman*, 25 N. Y. 552; and treated as settled in *Manchester Manufacturing Company v. Sweeting*, 10 Wend. 163; and though questioned, yet not denied in *Warner v. Beardsley*, 8 Id. 194, and *Herrick v. Borst*, 4 Hill, 650; limited in *Trimble v. Thorne*, 16 Johns. 151; and by *Andrews, J.*, in *Wells v. Mann*,

45 N. Y. 327, so as not to include indorsers and guarantors by independent collateral contract; and recognised by Church, C. J., in *Hubbard v. Gurney*, 64 N. Y. 457."

In an exhaustive note to *Pain v. Packard* and *King v. Baldwin* included in the second volume of American Leading Cases, the learned editors say, p. 367: "In the states of Maine, Vermont, New Hampshire, Connecticut, Indiana, Ohio, Maryland and New Jersey, the doctrines of *Pain v. Packard* have been repudiated. And it has been held that when the surety has sufficient funds for the purpose he is both legally and morally bound to pay the debt when it falls due, and when he has not, that he may perhaps resort to a court of equity to compel the institution of a suit against the debtor, subject to the restrictions which such a court would impose; but that he cannot, under any circumstances, be entitled to direct or control the course of the creditor by a mere notice *in pais*: *Hubbard v. Davis*, 1 Aiken, 296; *Montpelier Bank v. Dixon*, 4 Vt. 599; *Baker v. Marshall*, 16 Id. 25; *Page v. Webster*, 15 Maine, 269; *Mahurin v. Pearson*, 8 N. H. 539; *Bull v. Allen*, 19 Conn. 101; *Pintard v. Davis*, 1 Zab. 632; *Sascer v. Young*, 6 Gill. & J. 243. The law was held the same way in the cases of *Broughton v. Duval*, 3 Call, 61; *Dennis v. Rider*, 2 McLean, 451; *Carr v. Howard*, 8 Blackf. 191; and *Jenkins v. Clark*, 7 Hammond, 72. But although the case of *Pain v. Packard* is not generally followed as an authority, yet its principle has been adopted, with some restrictions, as part of the statute law of the states of Virginia, Georgia, Ohio, Indiana, Illinois, Tennessee, Missouri and Alabama: *Wright v. Stockton*, 5 Leigh, 53; *Parish v. Gray*, 1 Humph. 88; *Braman v. Hawk*, 1 Blackf. 393, *Reid v. Cox*, Id. 312; *Nichols v. McDowell*, 14 B. Mon. 6; *Moreland v. The State Bank*, 1 Breese, 207; *Towns v. Riddle*, 2 Ala. 694; *Howard v. Brown*, 3 Ga. 523; *Bolton v. Lunday*, 6 Mo. 46."

The departure in the principal case from the English rule, that the remedy of the surety is to pay the debt himself to the creditor, and then bring his action against the principal, when the surety fears loss from the insolvency of his principal, has been recently adopted in *Martin v. Skehan*, 2 Col. T. 614, upon the authority of the doctrine prevailing in New York. The courts of Pennsylvania also hold that notice to the creditor to proceed against the principal will operate to exonerate the surety if not followed: *Geddis v. Hawk*, 10 S. & R. 37; *Cope v. Smith*, 8 Id. 110; and in *Conrad v. Foy*, 68 Pa. St. 383. In this latter case, Agnew, J., in delivering the opinion of the court, regrets that a mere notice *in pais* should in any instance discharge a surety in a solemn bond or note in writing; and after stating that a notice in writing has not been required by the prior decisions of that state, proceeds: "We have a right to hold, and justice requires us to say, however, that nothing less than clear and positive proof of the notice given by a person duly authorized to give it, and a notice clear and explicit in its terms, given at a time when the creditor has it in his power to proceed to collect his debt, should discharge the surety from an undoubted legal obligation to pay the debt."

In *Eaton v. White*, 66 Maine, 221, the court adopt the principles of the English common law upon this subject, in the absence of statutory provision, and cite *Leavitt v. Savage*, 16 Maine, 72; *Page v. Webster*, 15 Id. 249; *Frye v. Barker*, 4 Pick. 382; and *Halsted v. Brown*, 17 Ind. 202, to show that the request of a surety to the creditor to sue the principal, does not in general secure his release at common law, if such suit is not brought.

But as appears *supra*, many of the states of the Union have provided for the discharge of the surety upon notice to the creditor to proceed against the principal, and recent decisions upon the interpretation of these statutes will

be found in *Villars v. Palmer*, 67 Ill. 204; *Gillman v. Ludington*, 6 W. Va. 123, holding that the creditor to whom notice should be given, is the party having the legal title to the claim, and the right to institute suit, and not a party merely claiming to have an equitable ownership; *Harrison v. Price*, 25 Gratt. 553, the court saying, per Anderson, J., that the statute requiring the creditor, upon notice, to proceed against the principal, does not make it necessary that the creditor should exhaust his remedies against the principal before he can have satisfaction out of the estate of the surety; *Boyd v. Tinsler*, 6 Coldw. 568; *Conklin v. Conklin*, 54 Ind. 289; *Chrisman v. Tuttle*, 59 Id. 155; *Baker v. Kellogg*, 29 Ohio St. 663. Other states that have legislated upon this subject are Alabama, sec. 3074, 3075, Revised Code; Arkansas, sec. 5696, 5697, 5698, Digest; California, sec. 2845, Civil Code; Georgia, sec. 2156, Code; Mississippi, sec. 2257, Revised Code; North Carolina, ch. 110, sec. 5, Battel's Revisal; and Texas, art. 4783 of Laws, in all of which sections the doctrine of the principal case is adopted, with certain limitations as to form of notice, time within which creditor must sue, after service thereof, and exceptions in case of sureties on official bonds.

BARNEY v. DEWEY.

[13 JOHNSON, 224.]

ALLEGING FRAUD IN SALE.—In an action for fraud in a sale, it is unnecessary to set forth the contract or the consideration, as that is matter relating only to the damages.

JUDGMENT AGAINST VENUE EVIDENCE.—In an action on the case for falsely affirming a chattel sold to have been the property of the vendor, the vendee may give in evidence against the vendor, a judgment obtained by the rightful owner for the recovery of the chattel in an action against the vendee, the allegation that the vendor was present as a witness at such action being tantamount to an allegation of notice to the vendor of the pendency of the suit.

TRESPASS on the case. The declaration stated, that the defendant, intending to deceive and defraud the plaintiff, falsely represented a certain horse to be the property of the defendant, thereby inducing plaintiff to purchase him; that the defendant well knew the horse belonged to a third person, one Thadeus Dewey, and in an action brought against plaintiff by T. Dewey, testified that the horse was the property of T. Dewey, and that he, the defendant, had no right to part with the horse; that by reason of this testimony judgment was recovered against plaintiff, who had expended sundry sums in defending that action.

Demurrer, for causes appearing from the opinion, and joinder.

D. Russel, in support of the demurrer, cited Cro. Eliz. 292; Hob. 69, 77, 41; Cro. James, 583; 1 Cro. 79, 144; Doug. 620; 9 Johns. 291.

Skinner and Z. R. Shepherd, contra.

By Court, SPENCER, J. The defendant has demurred specially to the declaration, for these causes: 1. That it does not set forth the contract between the parties; 2. That it does not state any consideration moving from Barney to buy the horse of Dewey; 3. That the plaintiff founds his right of action on the recovery had against him by a third person; and, 4. Because the declaration contains the evidence of facts, and not the facts themselves. None of the objections are well founded. The declaration is not very technically drawn, but it contains every essential requisite; it is a mistake to suppose that the action is founded on a contract; it is for a fraud. Fraud or deceit, accompanied with a damage, is a good cause of action; and the late C. J. said, in *Upton v. Vail*, 6 Johns. 182 [5 Am. Dec. 210], that this is as just and permanent a principle as any in our whole jurisprudence. It was not requisite to set forth the contract between the parties, or any consideration, it is enough to state the fraud and deceit, and the damages. Had the defendant given the horse to the plaintiff, affirming him to be his, and had the plaintiff been afterwards prosecuted for the horse, and subjected to costs and damages, he might have maintained an action for the fraud and damage.

The fact of a recovery in the action against the plaintiff by Thadeus Dewey, on the ground that the horse was not the property of the defendant, was not only a proper averment in the declaration, but it would be conclusive against the defendant, if proved: *Blasdale v. Babcock*, 1 Johns. 517. There is no allegation of notice to the defendant of the pendency of the suit brought by Thadeus Dewey, but there is an averment of a fact tantamount. It is alleged that the defendant was a witness on that trial, and proved, himself, that he did not own the horse when he sold him to the plaintiff. With respect to the omission to state the price paid for the horse, it is only a matter relating to the liquidation of damages; and it is a principle that, after showing a right to damages, it is matter proper for the jury, and is not necessary to be shown to the court in the first instance: 1 Chitty Pl. 296. I perceive no substantial, or even formal, objection to the declaration.

Demurrer overruled.

As to the sufficiency of the notice of the prior pending action, to render a judgment obtained therein conclusive against the party receiving such notice, this case is relied upon in *City of Boston v. Worthington*, 10 Gray, 499; *Carpenter v. Pier*, 30 Vt. 87, 88.

And to show that, in declaring for a fraud in the sale of a chattel, though

the sale must be stated, it is not necessary to set out either the contract of sale or the consideration; this case is followed in *Webster v. Hodgkins*, 25 N. H. 139; *Mahurin v. Harding*, 28 Id. 131; *Vail v. Strong*, 10 Vt. 462.

The case is further cited as giving a right of action for fraud or deceit which results in damage, in *Bartholomew v. Bentley*, 15 Ohio, 666; *Bedell v. Stevens*, 28 N. H. 124; *Culver v. Avery*, 7 Wend. 385; *Curwin v. Davison*, 9 Cow. 25. See *Monell v. Colden*, *post*, and also note to *Upton v. Vail*, 5 Am. Dec. 210, upon the right of action arising from fraudulent representations.

MARTIN v. STILLWELL.

[13 JOHNSON, 275.]

WORDS ACTIONABLE PER SE.—Words charging a woman with keeping a bawdy house are actionable *per se*; for if true, they would subject her to an indictment as for a crime involving moral turpitude.

SLANDER. The declaration contained six counts, in the first four of which the plaintiff alleged special damage, which she failed to prove at the trial. In the fifth count, the words charged to have been spoken were: "Mrs. Martin (the plaintiff) kept a bawdy house in George's street," meaning a certain street in the city of New York; and in the sixth count, the words charged were, "she kept a bawdy house in George's street." Verdict for the plaintiff on the last two counts, and motion in arrest of judgment, on the ground that the words were not actionable.

Skinner, in support of the motion.

Z. R. Shepherd, *contra*.

By COURT. In *Brooker v. Coffin*, 5 Johns. 191 [4 Am. Dec. 337], on demurrer to the first count in the declaration, etc., the words were: "She is a common prostitute, and I can prove it;" and this court decided that those words were not actionable. The law as to what words are actionable is settled in that case, and the following rule was laid down as the safest, and one which the cases warranted, viz: "In case the charge, if true, would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words would be in themselves actionable." If this rule is to govern the decision in this cause, then the present motion must be denied, because there is no doubt that keeping a bawdy house is a common nuisance, and that the person keeping it is liable to an indictment. The words here as laid in the fifth and sixth counts of the declaration, are

"Mrs. Martin kept a bawdy house in George's street." "She kept a bawdy house in George's street," which words (if true) would have subjected her to an indictment; and although the punishment for this offense could not have been infamous, yet, according to the above rule, it would have been for a crime evidently involving moral turpitude. These words are consequently in themselves actionable, and the motion in arrest must be denied.

Motion denied.

The authority of this case is recognized in *Bissell v. Cornell*, 24 Wend. 356; *Young v. Miller*, 3 Hill, 23; *Wright v. Page*, 36 Barb. 439; S. C., 3 Keyes, 581.

RUGGLES v. LAWSON.

[13 JOHNSON, 285.]

DELIVERY OF DEED.—Where one executed a deed, in consideration of love and affection, to two of his sons, and delivered the same to a third person, to be by him delivered to the grantees, in case the grantor should die intestate; and the deed was delivered to the grantees, the grantor having died intestate, it was held that the deed was valid and took effect from the first delivery.

PETITION for partition. The plaintiff alleged that he was seised in fee, as tenant in common, of an undivided moiety of the premises in question; and that the defendants, the heirs at law of Robert Thompson, jun., were seised of the remaining undivided moiety. Several of the defendants put in pleas of confession, and the seisin of the plaintiff was admitted on the trial. The only question was as to the effect of a certain deed, given under circumstances which appear from the opinion, by which two of the defendants claimed to be sole seised of the undivided moiety with the plaintiff. A verdict was taken for the plaintiff, subject to the opinion of the court.

By Court. The only question in this case relates to the effect and operation of the deed from Robert Thomson, jun., to his two sons, Robert and Nelson. The deed was duly executed by the grantor in his life-time, and delivered to a third person to be delivered to the grantees, in case the grantor should die before having made and executed his will. The grantor did die without having made any will, and the deed was after his death delivered to the grantees. If this deed is to be considered as an escrow, the estate, under the circumstances stated in the case

passed to the grantees upon the delivery, after the death of the grantor. It is a well settled rule, with respect to an escrow, that if either of the parties die before the condition is performed, and afterwards the condition is performed, the deed is good and will take effect from the first delivery: *Shep. Touch.* 59. It may, however, be questionable whether this deed may be viewed as an escrow; the grantees had nothing to do on their part in order to make the deed absolute, which is usually the case where a deed is delivered as an escrow. The delivery here was, at all events conditional, and to become absolute upon an event which has taken place, and as in the case of an escrow, the deed will take effect from the first delivery. This principle is very fully laid down and illustrated in the cases of *Wheelwright v. Wheelwright*, 2 Mass. 447 [3 Am. Dec. 66]; and *Hatch v. Hatch*, 9 Mass. 307 [6 Am. Dec. 67]. The grantees in this deed are, therefore, entitled to a moiety of the premises, and partition must be made accordingly.

See the note to *Wheelwright v. Wheelwright*, 3 Am. Dec. 66, for later decisions upon this question.

AUSTIN v. HALL.

[13 JOHNSON, 286.]

RELEASE BY JOINT OWNER.—Where an action is strictly a personal one, and the plaintiffs are bound to join in it, as in an action of trespass *quare clausum fregit*, brought by tenants in common, a release by two of the plaintiffs will be a bar to the action.

TRESPASS *quare clausum fregit*, brought by the plaintiffs as tenants in common of the *locus in quo*. The question raised was as to the effect of a release by two of the plaintiffs of all their claim against the defendants by reason of the alleged trespass.

Z. B. Shepherd, for the plaintiffs, cited Cro. Eliz. 411; 2 Cro. 68; Co. Lit. 197 b; 1 Salk. 260; Cro. Jas. 231; 2 W. Bl. 1077; 2 Burr. 668.

D. Russell, *contra*, cited Cro. Eliz. 648; Bac. Ab. Release, G.; 6 Co. 35; 1 Lev. 272; 1 Ld. Raym. 648, 649; Co. Lit. 285 a.

By Court. The declaration in this case is for a trespass on land, and an eviction of the plaintiffs; and for the damages sustained by reason thereof this suit is brought. The action is strictly a personal one, and the plaintiffs were bound to join in

it. The release, therefore, by two of the plaintiffs is a bar to the action, and the defendant is entitled to judgment.

Judgment for the defendant.

This case is considered as authority upon the point that a release by one of two or more having a joint personal interest will be binding upon the others, and is followed in *Decker v. Livingston*, 15 Johns. 482; *Wheeler v. Curtis*, 11 Wend. 663; *People v. Keyser*, 28 N. Y. 228; *Bradley v. Boynton*, 22 Maine, 290; *Hall v. Gray*, 54 Id. 231; *Wisheart v. Legro*, 33 N. H. 182; *True v. Huntton*, 54 Id. 121; *Grossman v. Lauber*, 29 Ind. 622; *Smith v. Wiley*, 22 Al. 403; *Stapleton v. King*, 33 Iowa, 35. See, also, *Pierson v. Hooker*, 3 Am. Dec. 467, as to the effect of a release by one of the partners of a firm.

As to the necessity of tenants in common joining in an action of trespass *quare clausum fregit*, this case is relied upon in *Hill v. Gibbs*, 5 Hill, 58; *Monroe Savings Bank v. Rochester*, 37 N. Y. 368; and *May v. Slade*, 24 Tex. 208.

ABEEL v. RADCLIFF.

[13 JOHNSON, 297.]

ASSUMPSIT AGAINST LESSEE HOLDING OVER.—Assumpsit for use and occupation lies against a lessee by deed who holds over after the expiration of the term, or against a lessee holding under a covenant for a renewal in a lease which has expired.

COVENANT TO RENEW LEASE.—The lessor's covenant to let the land to the lessee, at the expiration of the term, without mentioning any price or term, is void for uncertainty.

CERTAINTY IN WRITTEN INSTRUMENTS.—Every agreement required by the statute of frauds to be in writing, must be certain in itself, or capable of being made so by a reference to something else, whereby the terms can be ascertained with reasonable precision, or it cannot be carried into effect.

ASSUMPSIT to recover the rent of certain premises. The declaration contained two counts—one for the use and occupation of the premises; the other a *quantum meruit* thereon. Plea, the general issue. It appeared in evidence that the plaintiffs, being the owners of the premises, on the first of April, 1793, by an indenture of that date made between them and David Van Bergen, demised the premises to Van Bergen for the term of ten years, at an annual rent of four pounds ten shillings: "Provided, nevertheless, that the parties do hereby agree, that, at the expiration of the above term, the parties of the first part shall, if convenient, take and pay for the buildings on said lot at the appraisal of three indifferent men to be chosen by the said parties, or let the said lot for a yearly rent to be fixed by three indifferent men in like manner to be chosen by the said

parties. It is nevertheless to be observed that the said party of the second part shall not put on said lot any more buildings than a house and barn, which buildings only are to be appraised and paid for." The lessee took possession under the indenture, and the premises came into the possession of the defendant by sundry mesne assignments. The plaintiffs claimed in this action for rent accruing since the assignment in June, 1808. On the expiration of the term, the plaintiffs refused to have the buildings appraised, but offered a renewal of the lease for a short time; this the defendant refused, claiming that he was entitled to a perpetual lease. The defendant had not paid any rent. The case was submitted upon these facts.

E. Williams, for the defendant, contended that the present action could not be maintained; that the plaintiffs' remedy was on the contract; that the intention of the parties was, that there should be a permanent lease: 3 Atk. 33, 475; 2 P. Wms. 196; 1 Bro. P. O. 522; 2 Bro. C. O. 636, 639; 3 Id. 63; 4 Id. 415; 2 Ves. 498; 3 Ves. jun. 295, 298, 378; 6 Id. 232; Cowp. 819.

Cantine, contra.

By Court, VAN NESS, J. The first question is, whether the plaintiff can recover in this form of action. I think they can. The demise for the first ten years had expired before the defendant became the assignee; and the rent, for the recovery of which this suit is brought, is for the use and occupation of the premises since that period. There can be no doubt that *assumpsit* will lie against a tenant who holds over; in such cases the law creates a tenancy from year to year, and the tenant cannot be turned off without a previous notice to quit: *Doe v. Bell*, 5 T. R. 471.

The defendant cannot be said to hold under the lease; the covenant for a new lease never having been executed upon the expiration of the ten years. After that period the defendant must be considered as holding under the covenant for a renewal; this case then is very analogous to that of *Elliot v. Rogers*, 4 Esp. 59. This was *assumpsit* for use and occupation; the plaintiff's testator had agreed by deed to give the defendant a lease, and it being objected that the action could not be maintained, Lord Kenyon held that if there had been a demise by deed the plaintiff could not maintain *assumpsit*; but that the agreement was not a lease, but only an agreement for a lease; that the defendant did not hold under the deed, and that the action was, therefore, maintainable. The covenant for a re-

newal of the lease, in this case, never having been executed, no action could be maintained upon it to recover the rent in question. This case is clearly distinguishable from that of *Smith v. Stewart*, 6 Johns. 46 [5 Am. Dec. 186], inasmuch as the defendant there entered under a contract to purchase the fee of the land, though I thought the action was maintainable even in that case. It is submitted to us, also, to decide for what term or estate the plaintiffs were bound to give a new lease under the covenant stated in the original lease. The defendant contends he is entitled to an estate in fee, rendering such rent as shall be fixed by appraisement. This pretension is altogether inadmissible. The object of the parties, probably, was to give the lessee a new lease for such a term as would reimburse or indemnify him for his expenses in the erection of a house and barn, in case the plaintiffs did not elect to pay for them at the expiration of the ten years. It is clear that an estate in fee was not contemplated by either of the parties. The words are, that the plaintiffs are "to let the said lot," etc. The word let is strictly applicable to a lease, and not to a deed in fee, and a lease is for life or for years, or at will, and always for a less time than the interest of the lessor in the premises. In England it is not unusual to insert a covenant in the lease, for a perpetual renewal, upon certain specified terms, but none of the cases upon this subject (several of which have been cited for the defendant), show this to be a covenant of that description. In all the cases cited, as well as some others, a perpetual renewal was agreed to be given, either by express words or necessary implication or construction, neither of which exist in the case before us. Construing the words of this covenant, *per se*, as we are bound to do, I think the plaintiffs, at most, would not be bound to give any other than a new lease for the same term as that for which the original lease was given, namely, for ten years. But I am of opinion that this covenant is totally void for uncertainty. How far this uncertainty might be obviated by a bill in the court of chancery to which the decision of this point properly appertains, I do not know.

But proceeding upon the naked agreement, it is impossible to collect from it for what term the parties contemplated the new lease should be given. It is possible that it may be a good agreement for one year, but the words, that the land is to be "let for a yearly rent, to be fixed," etc., seems to imply that a longer term was contemplated. As I have before remarked, it probably was the intention of the parties to permit the lessee to

occupy the land until he should be paid for the buildings erected by him; but the agreement is too loose and vague to justify giving even such an effect to it. Every agreement which is required to be in writing by the statute of frauds, must be certain in itself, or capable of being made so by a reference to something else, whereby the terms can be ascertained with reasonable precision, or it cannot be carried into effect. The cases to this point are numerous and decisive, as will appear by a short reference to some of them. In *Blagden v. Bradlea*, 12 Ves. 466, there was a bill for the specific performance of an agreement for the purchase of land, and the master of the rolls observed that an auctioneer's receipt may be a note in writing, or memorandum within the statute; but then, the receipt must be certain within itself, or by reference to something else, so that it may be known what the agreement was. That one material particular did not appear in the receipt, namely, the price. The plaintiff must show a complete written agreement, and the bill was dismissed.

In *Clinan v. Cooke*, 1 Scho. & Lef. 22, there was an agreement for a lease, in which the term for which the lease was to be made was not mentioned, but the complainant (who filed the bill for a specific performance of the contract) was to pay a yearly rent of two guineas for the first year, and two pounds eight shillings for the remainder of the term. The lord chancellor of Ireland held that the agreement, being silent as to the term to be demised, the defendant was not bound to perform the contract. This case, in its leading features, is very like the present, and appears to have been settled upon great deliberation. In *Seagood v. Meale*, Prec. in Ch. 560, a like bill was filed on a written agreement which did not specify the terms, and the bill was dismissed. The same doctrine will be found in a great variety of other cases, as well at law as in equity, and the rule which I have mentioned appears to be settled upon the firmest basis: *Boydell v. Drummond*, 11 East, 142; *Clark v. Wright*, 1 Atk. 12; *Bailey v. Ogden*, 3 Johns. 399 [3 Am. Dec. 509]; *Twuney v. Crowther*, 3 Bro. C.C. 318; *Symondson v. Tweed*, Prec. in Ch. 374; *Gilb. Eq. Cas.* 35; *Bromley v. Jeffries*, 2 Vern. 415; *Underwood v. Hitchcock*, 1 Ves. 279. In the case before us parties have omitted to state the term for which the new lease was to be given, and unless the court makes a contract for them, the defendant is without a remedy, at least upon the case now presented to us. From what has been said it follows that the plaintiffs are entitled to judgment for ninety-five dollars and

sixty-five cents. The stipulation in the case is, that twenty-five dollars per year shall be considered as a fair rent upon a lease for ten years; I presume, however, it was intended that the same rent should be allowed in case the court should be of opinion that the plaintiffs were not bound to give a new lease.

Judgment for the plaintiffs accordingly.

Subsequent decisions in the State of New York recognise the soundness of the principles here laid down, as to the necessity of precision in the terms of a writing itself, or by such a reference to something else as will make the terms certain: *Tracy v. Albany Exchange Co.*, 7 N. Y. 474; *Wright v. Weeks*, 25 Id. 181; *Dillaye v. Greenough*, 45 Id. 446; and *W. Trans. Co. v. Lansing*, 49 Id. 504, where the case is particularly cited as to the uncertainty in the covenant to renew the lease. Further citations upon the rule of this decision will be found in *Farwell v. Mather*, 10 Allen, 325; *Holmes v. Evans*, 48 Mass. 251; *Sales v. Hickman*, 20 Pa. St. 183; and *Hodges v. Howard*, 3 R. I. 158.

WHITE v. SKINNER.

[13 JOHNSON, 307.]

PERSONAL LIABILITY OF AGENT.—If a person execute a bond as attorney for another, without authority, such person so assuming to act is personally bound, as though he had covenanted in his own name simply.

PLEADING AUTHORITY.—Where a person seals a deed or executes a covenant in behalf of others, it is incumbent upon him to set forth in his plea and prove the authority under which he acted, in order to release him from his personal liability.

COVENANT. Plaintiff declared upon an agreement under seal, alleging that defendant had by such agreement engaged to pay plaintiffs certain sums of money for a quantity of machinery to be made by the plaintiffs and delivered at the Grenville cotton factory in specified lots at stated times; and assigned breaches, in not paying the sums set forth. Upon oyer of the agreement it appeared that the instrument was drawn as a contract between the plaintiffs and the directors of the Grenville Cotton Manufacturing Company, but was signed by the defendant alone, the president thereof, as follows: "For the directors, Ruben Skinner [L.s.]" The defendant pleaded *non est factum*, and that he signed as the president and agent of the company, and in that capacity alone. Demurrer to this plea and joinder.

Buel, in support of the demurrer.

Cowen and Skinner, contra, urged that the demurrer admitted the fact that the defendant acted as agent merely; that if the defendant had no authority to execute the instrument, the same

was void and the remedy was case for the fraud or injury; and that, as there was no pretense of fraud, the acts of the agent should be favorably and liberally construed: 1 Johns. Cas. 110, 174; 2 Cai. 310.

By Court, PLATT, J. The law is well settled that one person cannot seal for another without express authority, and it is also settled that if a person execute a bond as attorney for another, without authority, such person so assuming to act is personally bound, as though he had covenanted in his own name simply: 7 T. R. 207; 8 Johns. Cas. 180; 2 Cai. 254; 5 East, 148.

The case of *Tippets v. Walker*, 4 Mass. 595, is similar to the present in almost every feature. There a committee of a turnpike corporation covenanted in their own names, as a committee, to pay for making a road for the corporation, and the question was, whether they were personally liable. Parsons, C. J., in delivering the opinion of the court, says: "If any individuals who are agents for the corporation, or of any officers of it, will voluntarily stipulate with workmen for their payment, it is reasonable that they should be holden to their contract. A case of this kind is not like a contract made by an agent for the public, and in the character of an agent, although it may contain an engagement to pay in behalf of the government. For the faith and ability of the state in discharging all contracts made by its agents in its behalf, cannot, in a court of law, be drawn in question." Testing the defendant's plea by these rules, I think it is bad, and the demurrer is well founded. The defendant represented himself and assumed to act as the agent of the directors of the manufacturing company. He is now sued in his private individual capacity; and to exonerate himself, he was bound to aver and prove that he had authority to seal for his co-directors.

The covenant is not to be regarded as a nullity. The plaintiff relied on this specialty security. If it does not bind the directors, for whom the defendant represented himself as an agent, then it is personally obligatory on the defendant alone, and it is incumbent on the defendant, not on the plaintiffs, to aver and prove the authorization, if any, by which the defendant contracted for Raymond and Hitchcock, or for the company. Whether he had such authority is a fact for which the defendant is alone responsible, and he has no right to call on the plaintiffs to prove either the negative or affirmative. The plea is therefore bad, because it contains no such averment, upon which the plaintiffs might have taken issue. If the defendant

is not personally bound, he ought by his plea to have shown that upon this covenant the plaintiffs had a right of action against some other person.

That the plaintiffs were stockholders or partners in this manufacturing company, affords no ground to defeat their claim under this covenant. The plaintiffs are entitled to judgment on the demurrer.

Judgment for the plaintiffs.

Upon the personal liability of one acting for another without authority, citations to this case will be found in *White v. Madison*, 26 N. Y. 123; *Bush v. Cole*, 23 Id. 269; *Pumpelly v. Phelps*, 40 Id. 67; see also the note to *Dusenbury v. Ellis*, 2 Am. Dec. 144, as to the liability as maker of one who signs a promissory note for another without authority.

WARDELL v. FOSDICK.

[13 JOHNSON, 336.]

FRAUD IN SALE OF LANDS.—An action on the case for a deceit lies for fraudulently selling land which has no existence, though there are covenants in the deed, which the plaintiff may disregard.

TRESPASS on the case for a deceit in selling to the plaintiff lands which had no existence. It appeared that in January, 1809, Corlies and his wife executed a deed to the defendants, with covenants of seisin, quiet enjoyment and warranty, of certain premises described to be in Pennsylvania. After the execution of this deed, one of the defendants told Corlies that he had been to Pennsylvania, and could find no such lands as were described in the deed, and threatened to prosecute Corlies. Sometime after, Corlies received a letter from one Bostwick, an attorney, stating that he had been authorized to commence proceedings against him, unless a settlement were made. But soon after Corlies met the other defendant, Davis, who said that they had sold the land, and he, Corlies, heard nothing more on the subject. The defendants executed a deed of the same supposed tract of land to the plaintiff in August, 1811, receiving a valuable consideration, and covenanting only that they had done nothing to impeach the title. The defendants, also, assigned the Corlies deed to plaintiff. Verdict for the plaintiff, subject to the opinion of the court.

Edwards and Slosson, for the plaintiff.

Baldwin, *contra*, contended that the defect here was patent

against which equity would not relieve: 1 Sugden on Vendors, 2, 195; 2 Ld. Raym. 1118, 1119; 1 Salk. 210; 3 T. R. 51, 56; and also, that the evidence of false affirmation applied only to Foe-dick, if at all.

By Court. The evidence is sufficient to support the allegation of fraud against both the defendants, and there appears no legal objection to this form of action. Where the party has been induced, by such a fraudulent representation, to pay his money, and accept a deed, it is immaterial whether any, or what, covenants are contained in the deed. The purchaser, so defrauded, has a right to treat the deed as a nullity, and may maintain an action on the case for the deceit: *Frost v. Raymond*, 2 Cai. 193 [2 Am. Dec. 828]; *Bostwick v. Lewis*, 1 Day, 250 [2 Am. Dec. 73]; Com. Dig., Action on the case for deceit, A. 8. Judgment for the plaintiff.

See an examination of the subject of fraud in sale of lands, in a note to *Bostwick v. Lewis*, 2 Am. Dec. 73.

KETCHUM v. EVERTSON.

[12 JOHNSON, 359.]

PERFORMANCE OF CONTRACT "TO GIVE" DEED.—Where one covenants "to give a deed of" certain premises, contracted to be sold, the covenant is fulfilled by executing a conveyance of the property without warranty, or personal covenants.

FULL PERFORMANCE A CONDITION PRECEDENT.—A party who has advanced money, or done an act in part performance of an agreement, and then stops short and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, cannot recover for what has been thus advanced or done.

ASSUMPSIT. The case is stated in the opinion. A verdict was found for the plaintiffs, whereupon the defendant moved for a new trial.

P. Ruggles and D. B. Ogden, for the defendant, in support of their motion, cited *Jackson v. Sternberg*, 1 Johns. Cas. 153; 1 Johns. 45; 3 Id. 216 [3 Am. Dec. 478]; 11 Id. 91 [6 Am. Dec. 355]; 1 Cruise's Dig. 334, sec. 24; 2 Ves. 631, 638; Co. Lit. 81; 12 Johns. 436; 1 Chitty's Plead. 25.

Oakley, contra, cited *Van Eps v. Schenectady*, 12 Johns. 436 [ante, 330]; 2 Bos. & P. 588; *Jones v. Gardner*, 10 Johns. 266;

Gillet v. Maynard, 5 Id. 85 [4 Am. Dec. 329]; Cowp. 565; 5 East, 143; 2 Keb. 136.

By Court, SPENCER, J. The plaintiffs seek to recover of the defendant seven hundred dollars, paid upon a contract for the conveyance of a farm; and it is contended that the defendant has violated the contract in several respects: 1. In this: That the deed executed by the defendant contains no covenants of warranty; 2. That the defendant's wife has not executed and acknowledged the deed; 3. That the boundaries specified in the deed do not embrace all the lands constituting the farm at the Four Corners.

It appears that the defendant executed a deed of the lands included in a mortgage given by Haight to Rogers and Lambert, which deed was ready to be delivered at the office of Rudd and Evertson, in Poughkeepsie, on the first day of May, 1811, but the plaintiffs did not then, or on any subsequent day, receive the same or perform the covenants which were simultaneously to be observed; the plaintiffs insisting on the preceding objections. It also appears, that the plaintiffs, who had taken possession of the farm contracted to be sold, abandoned the possession, and refused to perform their part of the contract, and that subsequently, the defendant sold the same for a less sum than the plaintiffs had contracted to give. These are the material facts in the case, and I apprehend there is no ground for the plaintiff's recovery.

The defendant stipulated "to give a deed of" the premises contracted to be sold to the plaintiffs. This covenant is fulfilled by executing a conveyance of the property without warranty, or personal covenants. The case of *Van Eps v. Schenectady*, 12 Johns. 436 [*ante*, 330], decides this point. If other reasons were necessary to show the propriety of that decision than those stated in that case, they at once suggest themselves. Courts of law can exact no more of parties than the performance of their contracts, according to the intention manifested by the terms used by them. When, therefore, it is agreed that a deed shall be given, nothing more can be exacted than an instrument sufficient to pass the estate of the party who is to give a deed. If it be required that the deed should contain covenants of warranty, nothing is more simple than the insertion of that stipulation in the contract. Courts are not to amend or alter the contracts of parties, and to construe an agreement to give a deed of a piece of land to be also an agreement to insert a warranty, would be exacting more than the agreement specifies. A

deed does not, *ex vi termini*, mean a deed with covenants of warranty, but only an instrument with apt terms conveying the property sold.

These observations equally apply to the second point. The defendant alone was to give a deed; the agreement is silent as to the defendant's wife uniting in the conveyance, and it would be an entire interpolation to say that the defendant agreed that his wife should join in the deed. Had the agreement been that the defendant should, by deed, vest the title to the lands sold; in the plaintiffs, then the plaintiffs would have had a right, if the entire legal title was in the defendant, so that the wife might have been endowed of the land, in case of her survivorship, to insist on her joining in the deed. It is not necessary to say, that the defendant had such an estate as that the wife might have been endowed, the agreement not giving rise to that question. The agreement evidently contemplates, that the deed to be given by the defendant shall be for the place called the Four Corners, as included in the mortgage given by Haight to Rogers and Lambert. A deed, then, adopting the boundaries and description in the mortgage, was a compliance with the contract; and it is admitted that the deed executed was according to the mortgage. The defendant, then, has complied with his agreement in all respects; and yet the plaintiffs, who have paid seven hundred dollars on the contract, and have totally refused to perform their part of the contract by accepting the deed, and giving a mortgage, seek to recover back the money thus paid, on the ground that the defendant has sold the farm and thus rescinded the contract. Where there is no agreement subsisting between the parties, but the same has been put an end to by the election or refusal of the defendant to perform it, in general, the other party may recover back any money paid by him in part performance. This was so decided in *Raymond v. Bearnard*, 12 Johns. 274 [*ante*, 317].

It may be asserted with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, has never been suffered to recover for what has been thus advanced or done. The plaintiffs are seeking to recover the money advanced on a contract, every part of which the defendant has performed, as far as he could by his own acts, when they have voluntarily and causelessly refused to pro-

ceed, and thus have themselves rescinded the contract. It would be an alarming doctrine to hold, that the plaintiffs might violate the contract; and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have. The defendant's subsequent sale of the land does not alter the case; the plaintiffs had not only abandoned the possession, but expressly refused to proceed, and renounced the contract. To say that the subsequent sale of the land gives a right to the plaintiffs to recover back the money paid on the contract, would, in effect, be saying that the defendant could never sell it without subjecting himself to an action by the plaintiffs. Why should he not sell? The plaintiffs renounced the contract, and peremptorily refused to fulfill it; it was in vain, therefore, to keep the land for them. The plaintiffs cannot, by their own wrongful act, impose upon the defendant the necessity of retaining property which his exigencies may require him to sell. This would be most unreasonable and unjust, and is not sanctioned by any principle of law. There must be a new trial, with costs to abide the event of the suit.

New trial granted.

For a similar decision see *Jennings v. Camp*, *ante*, 367, and cases cited in note.

In *Tipton v. Feltner*, 20 N. Y. 428, Denio, J., quotes the language of this case upon the necessity of a full performance to entitle one to a recovery for the money advanced or work done, and limits the principle strictly to the circumstances of this case, that of a vendee in an executory contract for the purchase of land, who has paid a portion of the purchase price, and refuses without cause, to make the final payment and receive a deed. See the principal case approved in *Clarke v. Rochester*, 28 N. Y. 627, in an action to recover back money advanced upon a contract for the sale of stock; and also in *Packer v. Button*, 35 Vt. 193.

In *Kyle v. Kavanaugh*, 103 Mass. 359, Morton, J., citing the principal case, says: "An agreement to convey a good title, therefore, does not necessarily entitle the covenantor to a warranty deed." By the Gen. Sta. c. 89, sec. 8, of Massachusetts, a quitclaim deed passes all the estate which the grantor could convey by a deed of bargain and sale.

WEBB v. DUCKINGFIELD.

[13 JOHNSON, 390.]

FORFEITURE OF WAGES BY DESERTION.—Where a seaman signs shipping articles, by which he engages not to go out of the vessel until the voyage be completed and the cargo discharged without leave first obtained, but left the vessel without leave after she was moored in her last port of discharge, and refused to assist in discharging the cargo, he was held to have forfeited his wages by such desertion.

FORM OF SHIPPING ARTICLES.—The master has no right to insert any stipulation or agreement repugnant to or inconsistent with the laws of the United States, but he may add any provision harmonizing with them.

CERTIORARI to the justice's court of New York city. The action was to recover the plaintiff's wages as a seaman on board the *Maria* on a certain voyage to Europe, and return to a port of discharge in the United States. It appeared that all the crew, of which the plaintiff was one, deserted the vessel upon her arrival at New York, and refused to remain and assist in discharging the cargo, although requested by the captain so to do. The articles signed by the defendant contained the clause: "The said seamen severally promise, etc., not to go out of the vessel, etc., until the said voyage be ended, and the vessel be discharged of her loading, without leave of the captain or commanding officer first obtained." There was also a stipulation that if any officer or seaman should leave the vessel without permission thus first obtained, the wages then due should become forfeited, and such forfeiture would not be waived by any subsequent return, and permission to do duty.

The justice gave judgment for the plaintiff below, being of opinion that there could be no desertion to work a forfeiture of the wages, the vessel having been safely moored in her port of discharge; and as the entry "All the crew absent without liberty," made each day in the log-book during the time the cargo was discharged by hired men, was insufficient, the names of the seamen not appearing therein.

Anthon, for the plaintiff in error.

Van Wyck, *contra*.

By Court, VAN NESS, J. All the seamen belonging to the ship, whose last port of delivery was New York, deserted her at that place, as soon as she was moored, and refused to assist in unloading the cargo, and the question is, can they recover their wages up to the time of the desertion or not? The determination of this question has nothing to do with the mate's making

an entry in the log-book of the desertion. Such entry, if it had been made, would have been *prima facie* evidence of that fact; but, as it is fully proved by the other testimony, that is sufficient without the log-book. The reasons for making these entries in the log-book are accurately stated by Judge Peters, vol. 1 of his Adm. Dec. 139, and have no application to this cause. By the sixth section of the act of congress for the government and regulation of seamen in the merchants' service, 1 L. U. S. 140, it is enacted "that as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract," etc. From this, as well as the reason and propriety of the thing, the contract with a seaman continues in force until the cargo is finally discharged, and, if he leaves the ship without justifiable cause, before that is accomplished, he has no right to recover any part of his wages. The shipping articles contain an express stipulation by which the wages are forfeited, in this case, in the very event which has happened. But the counsel for the seamen supposes this stipulation to be illegal, because it forms no part of what is provided shall be contained in the contract between the master and crew, by the first and second sections of the act before referred to. The master has no right to insert any stipulation or agreement repugnant to, or inconsistent with, the statute, but there can be no objection to superadding any provisions harmonizing with it. Such is the provision in question, which only follows the sixth section of the act, which may be considered as a legislative definition of what shall be deemed to be the termination of a voyage, so as to entitle the seamen to their wages. The principle upon which the two cases of *McMillan v. Vanderlip*, 12 Johns. 166 [*ante*, 299], and *Jennings v. Camp*, 13 Johns. 94 [*ante*, 367], were decided, is strictly applicable to this case. The judgment below must be reversed.

Judgment reversed.

See this case cited in 2 Parsons on Shipping and Admiralty, pp. 40, 105, from which it appears that shipping articles are construed in favor of the seamen in courts of admiralty jurisdiction: See also Abbott on Shipping, pp. 229, 722, 757, 767, 776 and 777, for further references to this case.

In *The Sarah Jane*, 1 Blatchf. & H. 410, Betts, J., says: "The supreme court of New York seems disposed to regard seamen merely as persons capable of making contracts and to construe and enforce their engagements by the same rules which are applied to the contracts of other parties. [Citing the principal case.] * * * Let the rule at law, however, be as it may, courts of admiralty proceed upon principles of liberal equity when called upon to

enforce bargains made by seamen, and hold that the party who sets up an agreement tending to the disadvantage of a seaman is bound to produce satisfactory proofs outside of the contract showing it to have been well understood by the mariner, and to be reasonable and just in itself. So in *The Triton*, Id. 285, the same judge, again referring to the principal case, says as to shipping articles: "When proceeded upon in courts of law, they are construed with all the strictness of other agreements, even as against sailors."

MONELL v. COLDEN.

[12 JOHNSON, 395.]

FRAUDULENT REPRESENTATION IN SALE.—Where a person was induced to purchase land upon the false and fraudulent representation, that a certain privilege was annexed thereto, but which is not included in the deed, he may maintain an action on the case against the grantor.

DAMAGES FOR FRAUD IN SALE.—In an action for falsely and fraudulently representing that a certain privilege was annexed to lands sold by the defendant to the plaintiff, it seems that the measure of damages is the difference between the value of the land conveyed and the amount the plaintiff was induced to pay by the fraudulent representations.

ACTION on the case for a fraudulent representation in the sale of land. The case appears from the opinion of the court before whom the cause came on a joinder in demurrer to the declaration.

P. Ruggles, in support of the demurrer.

Burr, *contra*.

By Court, THOMPSON, J. The declaration in this case contains six counts, varying in some small and mostly immaterial circumstances the plaintiffs' cause of action. To this declaration there is a general demurrer, which admits the facts therein stated. If, therefore, any of the counts set forth facts sufficient to make out a cause of action, the plaintiffs are entitled to judgment. Without noticing each count separately, it will be sufficient to state generally that the facts alleged are, substantially, that a conversation was had between the parties relative to the purchase by the plaintiffs, of the defendant, of a certain piece of land at Newburgh, adjoining the Hudson river, upon which conversation the defendant, for the purpose of inducing the plaintiffs to purchase the same, and to enhance the value thereof, fraudulently represented that he was the owner of land, and as such had by the laws of the state the privilege of having a grant or patent for the land under water, adjoining to the land so to be sold, and that if the plaintiffs would purchase the land

he would aid and assist them in obtaining a grant for the land under the water. The declaration states that upon such conversation an agreement for the purchase was made for the land, described by metes and bounds, and all the privileges and appurtenances to the same belonging. It is then averred that, many years before a patent for the land under the water had been granted to one Alexander Colden, and was then vested in one Cadwallader B. Colden, and was not in the people of this state, or in the defendant, and that all this was well known to the defendant. It is also averred that the principal inducement with the plaintiffs to purchase the land, was to obtain the water privilege, for the purpose of erecting storehouses and docks, and that the value of the land without this privilege was very greatly diminished, and that the plaintiffs had, pursuant to the directions of the act for that purpose, made application to the commissioners of the land-office for a grant of the land under the water, opposite to the land so sold, and were refused the same by reason of the previous grant to Alexander Colden.

These facts being admitted by the demurrer as true, I cannot see why they do not show a good cause of action. They show a most palpable fraud practiced upon the plaintiffs, in the sale of the land, and by which fraud they have been essentially and materially injured. If no representation had been made on the subject by the defendant, both parties would have been equally chargeable with a knowledge of the law, and the public records of the state. But according to the declaration the defendant knowingly and falsely misrepresented the fact, with respect to the situation of the land under the water, and if so, he is chargeable with all the damages resulting from such false representation. That a deed has been given, cannot affect the plaintiffs' claim for the fraud. The false representation was not respecting anything to be included in the deed, but with respect to a privilege which the plaintiffs were to acquire in consequence of owning the land on the shore adjoining the river. The law which is a public statute, prohibits the granting a patent for land under water, except to the owner of the land on the shore adjoining thereto. And it is a fact of public notoriety, that such grants are made almost as a matter of course, and without any consideration, except the mere patent fees. One count in the declaration contains an averment that the land without this privilege would not be worth more than five hundred dollars, but that, with the privilege, it would be worth thirty thousand dollars. The declaration gives a rule of damages

as certain as any declaration in such case, founded upon fraud, can give. It states the facts, and the damages arising therefrom are matters of inquiry upon the trial. What is the value of the privilege of which the plaintiffs are deprived, may be matter of uncertainty, but the value of the land sold, independent of this privilege, may be easily ascertained, and the difference between that and the price paid ought, at all events, to be refunded. But the event of the damages, or the rule by which they are to be ascertained, are not now subjects of inquiry. If the action can be sustained under such a state of facts, that is sufficient for the present, and in my judgment, it can be maintained. The facts as stated clearly show, that by the false and fraudulent misrepresentations of the defendant, the plaintiffs have been deceived, and materially injured: 6 Johns. 182 [5 Am. Dec. 210]; 13 Johns. 226 [*ante*]; 4 Taunt. 786. I am accordingly of opinion, that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

See citations in note to *Barney v. Dewey*, *ante*, 372, as to fraud accompanied with damages being a good ground for an action on the case for a deceit. In *Brown v. Castles*, 11 Cush. 350, this case is cited upon the same point.

PALMER v. HAND.

[13 JOHNSON, 434.]

VENDOR'S LIEN FOR PRICE.—Where goods are sold to be paid for on delivery, if upon delivery the vendee refuses to pay for them, the vendor has a lien for the price, and may resume possession of the goods.

VENDEE'S SALE BEFORE DELIVERY.—If before the delivery is completed the vendee sells or pledges the goods to a third person for value, but without notice to the vendor, the lien the latter may have is not affected, and he can recover from such subsequent purchaser.

TROVER. The case was submitted on a statement of facts, which appear from the opinion.

Van Vechten, for the plaintiff, cited: Roberts on Frauds, 165, 166, 167, 169; 1 Mod. 137; 2 Cai. 44; 2 Johns. 17; 3 Id. 390 [3 Am. Dec. 509]; 6 T. R. 54; 7 Id. 66, 440; 8 Id. 469; 3 Bos. & P. 232; 3 East, 99; 3 Cai. 185.

Henry, *contra*.

By Court, PLATT, J. This is an action of trover for a quantity of plank and scantling. It appears that the plaintiff was owner of a raft of lumber, and while descending the river opposite to

Lansingburgh he contracted with one Potter for the sale of the lumber, to be delivered to Potter by the plaintiff on one of the docks in Albany, at a price agreed on, to be paid on delivery. Potter then went to the defendant, who keeps a lumber-yard and dock at Albany, and agreed to deliver to him the lumber of that raft, to be sold by the defendant on commission for Potter. Next morning about sunrise the plaintiff arrived with the raft, and fastened it to the defendant's dock. The plaintiff then told the workmen employed there that he had sold the lumber to Potter. One or two men began immediately to pile the plank, etc., on the defendant's dock, and the plaintiff "asked if Potter was not to have more hands to take out and pile the lumber." The plaintiff then went into the city, and did not return again till four o'clock, P. M., at which time the lumber was almost all piled on the defendant's dock. The plaintiff then forbade the piling of any more, saying that Potter had absconded. While the men were piling up the lumber, about ten or eleven o'clock, A. M., of that day, the defendant advanced to Potter one hundred dollars, and also gave an order for one hundred and fifty dollars worth of goods, in favor of Potter, on account of the deposit of lumber. The plaintiff afterwards demanded the lumber, which the defendant refused to deliver.

There is no doubt that upon a contract to sell goods, where no credit is stipulated for, the vendor has a lien, so that if the goods be actually delivered to the vendee, and upon demand then made he refuses to pay, the property is not changed, and the vendor may lawfully take the goods as his own, because the delivery was conditional. As between the vendor and vendee in this case I incline to the opinion that the property in the lumber was not so vested in the vendee as that the vendor could not legally have resumed it when he came in the afternoon and forbade the piling of any more of it. The contract with Potter was for the whole raft, to be delivered on the dock. The vendor, therefore, had no right to demand payment for any part until the whole was delivered, and it appears that he came to the place of delivery at four o'clock in the afternoon of the day on which the raft arrived at the dock, whilst the lumber was still in the course of delivery, and signified his determination not to consider the sale as absolute. He said that Potter had absconded, and ordered the men not to pile any more of the plank, etc. As between Palmer and Potter there was no such delay or acquiescence on the part of the vendor as would be evidence of a credit given for the money. If the vendor was

there, and demanded payment as soon as the whole lumber was piled on the dock, that was enough to preserve his lien, and such, I think, is the fair construction of the evidence.

The plaintiff in this case seeks to enforce his lien against a person who has *bona fide* received the property as a pledge for money and goods advanced to Potter, to nearly the amount of its value. Those advances were made by the defendant while the lumber was in course of delivery on the dock, and before the plaintiff asserted his claim to it. But there is no evidence that the plaintiff had any knowledge of the negotiations between Potter and the defendant, in regard to the lumber until after the plaintiff had made his election to rescind his contract with Potter. This is a contest, then, between two honest men, who shall be the dupe of a swindler. The strict rule of law must therefore be applied, and the defendant cannot be allowed to stand in a more favorable situation than Potter would have been in if he himself had withheld the possession of the lumber without paying the price when demanded. We are therefore of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

In *Russell v. Minor*, 22 Wend. 662, in the court of error, this case is cited by Edwards, senator, who says: "Where something is to be done by the purchaser simultaneously with the delivery, which has not been waived by delivering the property without requiring it to be done, the delivery is conditional, and does not become complete so as to change the right of property until the condition is complied with, although the vendee get the possession of the goods; for possession in such case is obtained under an expectation on the part of the vendor that the terms of the contract will be complied with, and the vendor does not thereby part with his lien upon the property." The case is further cited in *Smith v. Lynes*, 5 N. Y. 46; and in *Morris v. Razford*, 18 Id. 555, Comstock, J., says: "I consider it a proposition plain in principle, and sanctioned by authority, that a vendor may reclaim his goods after delivery upon a sale for immediate payment if the vendee on getting the property into his possession refuses to make the payment. If there be no term of credit expressed or implied in the dealing, the delivery in such cases is deemed to be conditional, and subject to revocation, on the refusal or failure of the purchaser to pay the price." Citing *Palmer v. Hand*, *Haggerty v. Palmer*, 6 John. Ch. 487; *Keeler v. Field*, 1 Paige, 312; *Fletcher v. Cole*, 23 Vt. 114; *Ryder v. Hathaway*, 21 Pick. 298.

VAN VALKINBURGH v. WATSON.

[13 JOHNSON, 430.]

NECESSARIES SUPPLIED TO INFANT.—Where a parent neglects to furnish his infant child with necessaries, a third person may supply the infant therewith and charge the parent for the same; but what is actually necessary will depend upon the precise situation of the infant, of which the party giving the credit must inform himself at his peril.

CERTIORARI to a justice's court. The plaintiffs brought an action against Van Valkinburgh to recover the value of a coat furnished by them to the latter's infant son. The fact of the purchase of the coat was proved, but it did not appear that it was made with the father's consent. The defendant proved that his son lived in his family, and was comfortably and decently clothed, according to his circumstances. The judgment being for the plaintiffs below, this writ was prosecuted.

By Court. A parent is under a natural obligation to furnish necessaries for his wife and children, and if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit must be acquainted with at his peril: *Simpson v. Robertson*, 1 Esp. 17; *Ford v. Fothergill*, Id. 211. In the case of *Bainbridge v. Pickering*, 2 W. Bl. 1325, Gould, J., says, with great propriety: "No man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom; all that must be left to the discretion of the father or mother." Where the infant is *sub potestate parentis* there must be a clear and palpable omission of duty, in that respect, on the part of the parent, in order to authorize any other person to act for, and charge the expense to the parent. In this case there is no ground to charge the father with any neglect of duty, in providing necessaries for his child, and the judgment must be reversed.

Judgment reversed.

The doctrine of this case is adopted by Schouler, in his *Domestic Relations*, pp. 327, 331

BANCROFT v. WARDWELL.

[13 JOHNSON, 489.]

ACTION FOR USE AND OCCUPATION.—An action for use and occupation can be maintained only where the relation of landlord and tenant exists between the parties, and it will not lie against a person who has come in under the plaintiff as a purchaser from him.

ASSUMPSIT for use and occupation. It appeared that the premises had been held by one Hawes in his life-time under a lease for three lives, and were claimed by the plaintiff, Bancroft, as set off to Hawes' widow, who had subsequently married plaintiff, as her dower. It appeared that the premises were part of a large tract held by several tenants under a lease from one Lansing, and the defendant was in possession of the premises in question under the same lease. A witness called by the plaintiffs, testified that he, the witness, had entered upon the premises under the defendant, cultivated the land, and fenced the same; that Bancroft applied to witness, and said that he ought to pay something to discharge plaintiff's claim; that witness replied, that he had no authority to bind the defendant by a bargain, but would write to him about the matter. In answer to a letter written by the witness, the defendant wrote to witness to take possession of and cultivate such portions of the premises as remained unimproved, and that he would do what was right about it. The witness then fenced the remainder of the tract claimed by the plaintiffs, with the latter's consent. It appeared that when the plaintiffs demanded payment of the defendant to discharge the claim the former held, the latter said that plaintiffs had no right thereto. From conversation between Bancroft and the defendant nothing appeared to show that the former laid any claim to rent.

A nonsuit being granted, the plaintiff now moved to set the same aside.

Storrs, for the plaintiffs.

Talcot, *contra*.

By COURT. This is a motion to set aside a nonsuit granted at the trial. The action is for use and occupation, and the question is, whether the evidence was sufficient to support the action. It is a well settled principle that this action cannot be sustained, unless the relation of landlord and tenant exists between the parties. But the facts in this case furnish no evidence of any such relation. If the defendant could be considered as holding at all, under or by the permission of the

plaintiffs, it was as a purchaser, and not as a tenant. Such holding is not enough to maintain this action, according to the decision of the court in the case of *Smith v. Stewart*, 6 Johns. 49 [5 Am. Dec. 186]. There were no facts from which a tenancy could be inferred, and therefore nothing which ought to have been submitted to the jury. The first application made by Bancroft to the defendant's agent was to sell his claim to the land in question, and which then lay in common. Neither the letter written by the agent to the defendant, nor the answer, intimates any agreement to take possession as tenant. But the defendant directs his agent to take possession, at all events, and he would do what was right about it, when he came up. The possession was afterwards taken, with the consent of the plaintiffs, and under the above arrangement. The defendant never had consented to any arrangement other than to do what was right about it, and the only proposition made by the plaintiffs was to sell, and it was impossible, from these facts, to infer any agreement that could create the relation of landlord and tenant. The motion to set aside the nonsuit must therefore be denied.

Motion denied.

Belcom, J., delivering the opinion of the court in *Rider v. Union Indus Rubber Co.*, 28 N. Y. 386, explains this case, saying that nothing is intimated by the opinion that there was no recovery against a purchaser who enters upon lands under a contract for their purchase, and refuses to perform his contract; but that the remedy sought must be in an action of trespass and ejectment to recover the mesne profits. So, also, *Harris v. Frink*, 49 N. Y. 33, where it is said that the defendant could not be held liable for rent, because a promise to pay rent cannot be implied in a case where the one in possession entered under a different contract. In *Lyford v. Putnam*, 35 N. H. 567, the court hold that one entering under a contract for the purchase of land has only the rights of a tenant at will, and is liable in trespass if he cuts down trees. In *Woodbury v. Woodbury*, 47 Id. 20, after a careful examination of principles and authorities, Sargent, J., goes still further and concludes that the plaintiff has an election whether he will consider the one in possession under a contract to purchase, which he has failed to carry out, either as a trespasser or a tenant at will, and bring trespass or *assumpsit* for use and occupation accordingly.

But the doctrine of the principal case is followed in Pennsylvania, *McCloskey v. Miller*, 72 Pa. St. 154, where this case is cited together with *Dudding v. Hill*, 15 Ill. 61; *McNair v. Schwartz*, 16 Id. 24; *Rogers v. Libbey*, 35 Me. 200; in Maine, *Fox v. Corey*, 41 Me. 83; *Howe v. Russell*, Id. 447; in Missouri, *Cohen v. Kyler*, 27 Mo. 124; *Edmonson v. Kite*, 43 Id. 178; and in California, *Hathaway v. Ryan*, 35 Cal. 194.

As to *assumpsit* lying for the use and occupation of land upon an implied promise to pay rent, see *Gunn v. Scovil*, 4 Am. Dec. 206; *Sutton v. Mandaville*, Id. 549.

JACKSON v. MOORE.

[13 JACKSON, 512.]

PRESUMPTION OF CONVEYANCE.—Where several persons having undivided interests in a tract of land, made a partition thereof, and conveyed the whole to one in trust to reconvey to each grantor his portion in severalty, and the land was held according to this partition for forty years, it will be presumed, in an action of ejectment brought by one claiming by virtue of the partition, that the conveyance by the trustee in pursuance of the trust had been made.

ADVERSE POSSESSION UNDER LEASE.—Where one in possession under a lease in fee, gave the possession to another by parol, who also claimed under the lease, and by sundry other conveyances the possession was obtained by the defendant, it was held that this was a sufficient adverse possession to bar an action of ejectment commenced more than thirty years after the original entry under the lease.

STATUTE RUNNING AGAINST INFANT.—Where the statute has commenced to run in the life-time of the ancestor, an infant heir can claim no protection from his disability.

EJECTMENT. The facts appear from the opinion. A verdict was taken for the plaintiffs, subject to the decision of the court.

Van Vechten and Mitchell, for the plaintiff.

Z. R. Shepherd, contra.

By Court. The premises in question are a part of lot No. 15, in the artillery patent, and the lessors of the plaintiff are Cadwallader R. Colden and the heirs of Abraham Walton. The first question that arises is, whether any title has been shown in the lessors or any of them. The patent was granted in the year 1764, to Joseph Walton and twenty-three other persons, for twenty-four thousand acres of land. In the year 1765, a partition of the patent was made among the then proprietors, and for the purpose of making the partition, a deed in trust was executed to Abraham Walton, who covenanted, on his part, to execute releases in fee to the respective owners of the lots, according to such partition. This deed contained a recital that the parties of the first part had, by sundry meane conveyances, become seised of the lands granted by the patent, in the proportions therein mentioned, according to which lot No. 15, including the premises in question, fell to Cadwallader Colden, who was a party to the deed, and from whom Cadwallader R. Colden derives his title.

Eight of the original patentees were parties to this deed, so that as to eight twenty-fourth parts of the premises, the title was clearly conveyed to Abraham Walton. It was admitted

upon the trial that the patent was generally settled, and held under and according to this partition. These facts, after such a lapse of time, are sufficient to presume a title to the whole of the premises in the heirs of Abraham Walton, or that he had executed the trust, and conveyed in severalty, to the respective owners, and in either case the title would be thus proved in some of the lessors. The principles laid down and adopted by this court in *Doe v. Phelps*, 9 Johns. 171, and *Doe v. Campbell*, 10 Johns. 475, are directly in point, and would fully warrant a judgment for the plaintiff, were it not for the adverse possession on the part of the defendant. The lessor, Cadwallader R. Collden, can claim no benefit from his infancy; for the statute, if it has run at all, began to run in the life-time of the ancestor, and the facts disclosed upon the trial show a very strong case of adverse possession. As early as the year 1775, possession was taken of one hundred acres of lot No. 15, under a lease from Anthony Farrington. This lease was not produced upon the trial, but its loss and contents were sufficiently proved, and appeared to be a lease in fee, at a nominal rent. And although there was no legal transfer of the lease to Perkins, yet he, in the year 1778, took possession, claiming under it, and continued such possession, except while it was interrupted by the war, until the year 1798, when he sold and conveyed to Solomon Williams, who, in 1803, conveyed to Comstock, and in 1804 Comstock conveyed to the defendant. These facts show, very satisfactorily, such an adverse possession as will protect the defendant against the present action, and upon this ground alone judgment is given for the defendant.

Judgment for the defendant.

JACKSON v. GOES.

[12 JOHNSON, 512.]

EVIDENCE AS TO PATENT.—It is always open to the defendant in an action of ejectment to show that the lessor of the plaintiff is not the person intended by the patent under which he claims, although he may bear the same name.

EJECTMENT. The plaintiff claimed under letters patent issued to one Peter Shultze as bounty for service in the revolutionary army, and proved that there was a Peter Shultze then living. The defendant gave in evidence that there were two men of that name then living, one an officer in a certain regiment, but only

thirty-seven years of age at the time of trial, the other the person referred to by plaintiff as living at Rhinebeck, but who admitted that he had not served in the army, having hired a substitute through whom he claimed the land.

Verdict for the plaintiff, subject to the opinion of the court.

Vanderheyden, for the plaintiff.

Loucks, *contra*.

PLATT, J., was of opinion that the plaintiff was not entitled to recover, and thought the case clearly distinguishable from that of *Jackson v. Hart*, 12 Johns. 77 [*ante*, 280], the principle of which decision he held to be sound law.

YATES, VAN NESS, JJ., declared themselves to be of the same opinion.

SPENCER, J. The court being unanimously of opinion that the defendant is entitled to judgment, but for different reasons, it is rendered necessary for me to state very briefly the grounds of my opinion.

It is a general and a universal rule in this state that the plaintiff is to recover on the strength of his own title, and unless the defendant is estopped from controverting the plaintiff's title, he may rest on his possession, and attack the title under which the plaintiff claims. The grant under which the lessor deduces his title was issued under the act to carry into effect the concurrent resolutions and acts of the legislature for granting certain lands promised to be given as bounty lands, and by reference to those resolutions and acts, it will be seen that the objects of that bounty were the officers and soldiers serving in the army of the United States, in the line of this state, to wit, Lamb's regiment of artillery and two regiments of infantry. The letters patent to Peter Shultze were undoubtedly intended to vest in him, as a soldier in one of those regiments, a title to the lot in question as a bounty for his services in that capacity. It is perfectly clear that the lessor of the plaintiff cannot be the Peter Shultze to whom the grant was made, because the lessor confessedly was not a soldier in the revolutionary war. It is equally certain that Peter Shultze, who resided seven years before the trial at Warren, in Herkimer county, could not be entitled to military bounty for revolutionary services; for according to the case, he was born about the year 1777, and the war terminated in 1783, at which time he was about six years of age. I am of opinion that independently of the existence of Peter Shultze of Warren,

it would have been competent for the defendant to show that the lessor of the plaintiff, Peter Shultze of Rhinebeck, was not the patentee, and had no title merely from the adventitious circumstance of a similarity of name with the patentee to recover possession of the premises. This opinion, it appears to me, is warranted by the unanimous judgment of the court in *Jackson v. Stanley*, 10 Johns. 133 [6 Am. Dec. 319].

In the subsequent case of *Jackson v. Hart*, 12 Johns, 77 [*ante*, 280], though I took no part in that decision having been unavoidably absent when it was argued, I understand from the opinion expressed, that it was not intended to shake, much less to overrule the prior decision in *Jackson v. Stanley*. The identity of a grantor in many cases is a latent ambiguity. The deed is, on the face of it, free from ambiguity, the extrinsic or collateral matter out of the instrument, produces the ambiguity. The case commonly put is, where there are two persons of the same name, to both of whom the description in the deed is equally applicable, parol proof is then resorted to, to show to which of the two the deed was intended to be given: *Lord Cheney's case*, 7 Co. Rep. 68 b, is the earliest case on the subject, and has never been doubted. I cannot think it was necessary for the defendant to prove that there were two persons in existence at the time of the trial of the name of Peter Shultze, in order to be let in to show that the lessor of the plaintiff was not the patentee. There undoubtedly was such a man who served in the army of the United States, in the line of this state. This is proved by the letters patent; then why was it not admissible to the defendant to show that Peter Shultze, of Rhinebeck, was a different man? It seems to me that the proof that there was another Peter Shultze living at the time of the trial was making no progress in disaffirming the pretension set up by the plaintiff that his lessor was the patentee, when it clearly appeared that this Peter Shultze could not possibly be the patentee; the only effect of this was to show what required no proof, that there are many persons in the state of the same christian and surname.

In this action whenever the plaintiff introduces a deed conveying the premises to a person of the name of his lessor, it is *prima facie* evidence that the lessor in the real grantee. The burden of disproving this and repelling the presumption is thrown on the defendant, and he may prove that the deed was granted to a different person of the same name. If it be not so, than any man who can find a deed on record to a person of

the same name may use it for very mischievous purposes. If the plaintiff is not the patentee, then he has no title to the lot; and may not the defendant who is in possession, and can protect himself against every one but the true owner, show all the necessary facts to make out that the lessor has no title to the premises? Such proof does not vary or contradict the deed, but is perfectly consistent with it. It admits the grant to have been correct, but shows that the lessor is not what he assumes to be, the person to whom it was made, and that he has no right, not being the patentee, to turn the defendant out of possession.

Without being influenced at all by the evidence that there was another Peter Shultze in existence at the time of the trial, or a few years before, my opinion proceeds on the ground that the lessor of the plaintiff is proved not to be the patentee, and I hold that proof to have been correctly given.

THOMPSON, C. J. I concur in giving judgment for the defendant. I had come to a different conclusion, supposing that this case could not be distinguished from the case of *Jackson v. Hart*, 12 Johns. 77 [*ante*, 280]. But as I dissented from the opinion of the court in that case, and my brethren, who were parties to it, thinking it is not in the way here, I feel no hesitation in saying the plaintiff is not entitled to recover. I put it on the ground, however, that neither Peter Shultze, the lessor of the plaintiff, nor the other Peter Shultze mentioned in the case, was the person intended as the patentee; it appearing by the case, without entering particularly into the testimony, that the latter was not born at the commencement of the revolution, and the former not coming within the description of the persons mentioned in the act of the legislature, under which the patent was issued, and to which it refers. That the identity of the patentee is a matter that may be inquired into in this collateral way, is settled by the case of *Jackson v. Stanley*, 10 Johns. 136 [6 Am. Dec. 319], and which case, I understand, it was not intended to overrule by the decision in *Jackson v. Hart*. An inquiry as to the identity of the patentee does not in any manner contradict or make void the patent; nor does it imply that there is not a person in esse capable of taking under the grant. It only goes to show that the person claiming to be the patentee was not such person. If it should appear that he was the person intended, the inquiry must there stop. If the commissioners of the land-office had mistaken their powers, and made a grant to a person not coming within the description in the act, and the patent was sought to be vacated on that ground, there

can be no doubt that it must be done by some direct judicial proceeding. But an inquiry into the identity of a patentee would not come within the scope of a *scire facias*. This can only arise when some person comes forward to assert a right under the patent; it is then, and then only, that it can be objected to him that he is not the patentee, although he may have the same name. It is altogether a mistake that such an inquiry is an attempt to vacate the patent. It leaves it in full force and effect, according to its original intention and operation. This is not a naked grant to Peter Shultze. The patent refers to the act under which it was issued, containing a description of the persons intended to be embraced within the bounty of the legislature. This may be considered as matter of description adopted by the patent, and which necessarily opens the door to let in the inquiry whether the person claiming to be the patentee answers such description. The identity of the grantee, as well as of the thing granted, must, generally speaking, partake more or less of a latent ambiguity, explainable by testimony *dehors* the grant. It cannot be that this inquiry is restricted to the single case of ambiguity occasioned by there appearing to be two persons bearing the name of the patentee. I can discover no sound reason for such restriction, and I am persuaded that the rule thus understood, is too limited to meet all the cases that may arise, necessarily requiring its application.

It is, therefore, upon the broad ground that it is always open to a defendant in ejectment to show that the lessor of the plaintiff is not the person intended by the patent under which he sets up his claim, although he may bear the same name, that I concur in the judgment for the defendant.

Judgment for the defendant.

JACKSON v. DELANCOY.

[13 JOHNSON, 536.]

POSSESSION UNDER MORTGAGE.—Where a mortgage gave the mortgagee a right of entry on default, and after forfeiture a judgment was obtained on the bond against the mortgagor and the devisee of the debt entered under a sale upon execution, after an irregular revival of the judgment, and under the mortgage, it was held that the mortgage was a sufficient protection of the possession of the devisee against ejectment by one claiming under the mortgagor.

NO IMPEACHMENT OF SCIRE FACIAS COLLATERALLY.—A *scire facias* to revive a judgment, irregularly issued, or an execution issued after the statutory time, without *scire facias*, is voidable only, and cannot be called in question in a collateral action, so as to defeat the title of a purchaser under the execution.

DESCRIPTION IN SHERIFF'S DEED.—In a sheriff's deed the land sold must be described with reasonable certainty; accordingly nothing will pass under the general clause, "all other, the land, etc., of the defendant."

LIMITATION OVER, VOID.—In a devise of "all the real and personal estate" of the testator, a limitation over in case the devisee should die without disposing of the same, is void; as the word "estate" vested a fee in the first devisee.

ATTORNMENT WHEN VOID.—An attornment to one who enters upon land without title, is void, and such entry and attornment are not a disseisin or ouster to create an adverse possession in the one so entering.

TRUST ESTATE UNDER GENERAL CLAUSE.—A trust estate will pass under a general clause in a will relating to the realty, unless the intention of the testator appear from the will to be otherwise.

ERROR to the supreme court. Ejectment. The facts appearing from the special verdict are: William Alexander, commonly called Lord Stirling, being seised of a certain tract of land of which the premises in question formed a part, executed to Ann Waddell a mortgage, dated December 20, 1770, to secure several debts due her. The lands mortgaged comprised certain specifically described tracts, and "all other the lands, tenements, and hereditaments, belonging to said William, earl of Sterling, within the province of New York." The premises in question were not particularly described, but passed under this general clause. In 1771, Ann Waddell obtained judgment on two of the bonds recited in the mortgage, and had the same docketed. In 1773, she died, and by her will directed her executors, among other things, to collect "all outstanding debts of every kind," and her estate in certain patents, "and elsewhere, whatsoever and wheresoever, to be turned into money and equally distributed among her five children, share and share alike, who were to be tenants in common in fee of the realty, until such sale and distribution be made." The executors of Ann Waddell revived the judgment against Lord Stirling by a *scire facias* taken out in 1775, and he having died in 1783, the judgment was revived against his heirs, who were summoned, but not against his wife. The heirs allowed a default to be entered and the lands were sold at sheriff's sale to John Taylor, to whom a deed was executed, conveying several particularly described tracts, "and also, other the lands, tenements and hereditaments, whereof the said William, earl of Sterling, was seised on the

said twenty-sixth of June, 1771, or at any time afterwards within the county of Ulster, whether held in severalty or in common with others." Under this general clause the premises in question were included.

Lord Stirling, by his will dated in 1780, devised all his real and personal estate whatsoever to his wife, Sarah, to hold the same to her, her executors, etc.; and in case of her death, without disposing of the same by grant or devise, then over to his daughter Catharine. Sarah died in 1805, having devised, after certain pecuniary legacies, all the residue of her estate whatsoever, real and personal, in possession or action to Livingston and Clarkson in trust for her daughter Catharine, during her life, and then over to her children. These trustees were the lessors in this action.

It further appeared that Taylor was the husband of one of Ann Waddell's daughters, and had taken a release of the interest of three other of her children; that at the time of the mortgage to Ann Waddell there were several tenants in possession under Lord Stirling, all of whom, in 1790, attorned to Taylor, since which time they have held under him and his heirs.

The court below gave judgment for the defendants, heirs of Taylor.

J. Duer and Henry, for the plaintiff in error.

Oakley and Van Buren, contra.

KENT, Chancellor. The premises in question were originally owned by Lord Stirling, and the lessors of the plaintiff claim title under him. The defendants set up title under a mortgage which Lord Stirling executed to Ann Waddell, in 1771. A part of the debt secured by the mortgage was prosecuted at law, to judgment and execution, and John Taylor, under whom the defendants held, took, as purchaser, a sheriff's deed of the premises under the execution; and he was also at the same time entitled under the will of Ann Waddell to two fifths of her estate. If Taylor acquired a title under the sheriff's deed, or was entitled to the land under the will, the lessors of the plaintiff cannot recover. There is nothing in the case to warrant an inference that the mortgage has been satisfied or discharged; and in respect to the questions arising under the special verdict, it is to be considered as a subsisting incumbrance.

I am induced to think that the title set up by the defendants

under the sheriff's deed cannot avail them. Two objections are made to that title: 1. That the *scire facias* reviving the judgment was not duly directed and served; and, 2. That the premises were not duly sold by the sheriff. Of these objections one appears to be solid, and other not.

1. The *scire facias* was directed to the heirs of Lord Stirling, and served on them; but that service was of no use, for they took nothing by descent. Lady Stirling was the devisee of the real estate, and she was consequently the tenant of the freehold, and ought to have been the party to the writ. It was the same thing as to her rights, as if execution had issued, and the lands been sold on the dormant judgment against Lord Stirling without any revival by *scire facias*.

Still I take the law to be that even the omission altogether of the *scire facias* will not, as of course, render void a sale under the execution. An execution issued on a judgment after a year and a day, without revival, has been held to be voidable only, and a justification to the party under it until set aside: 3 Cai. 270; 8 Johns. 365. The *scire facias* is intended as notice to a party to show cause why execution should not issue, and to give him an opportunity to plead payment, or other discharge; and if it be omitted in a case requiring it he would, no doubt, be entitled to relief on proper application. But in this case the execution has been permitted to stand to this day without being regularly questioned by Lady Stirling or her representatives. She lived seventeen years after the execution had been thus irregularly issued, and it cannot but be presumed that the service of the *scire facias* on her daughters came seasonably to her knowledge; and even ten years have elapsed since her death, and no attempt appears to have been made by her heirs or devisees to set it aside.

I presume that the supreme court would not now sustain a motion to set aside the execution for irregularity, after so great a lapse of time. That court has once said, *Thompson v. Skinner*, 7 Johns. 556, that after the lapse of twenty years, no judicial proceeding whatever ought to be set aside for irregularity, and it has been denied in other courts even after twelve years: 2 Bay, 338. The obligation is infinitely stronger when the attempt is made to question the regularity of the execution, and to set aside the title under it, in this collateral action. The regularity of the revival of the judgment by the *scire facias* was not the point in issue in this cause. It was held in the supreme court of Pennsylvania, in *Heister v. Fortner*, 2 Binn. 40 [4 Am. Dec. 417],

that a judgment revived by *scire facias*, after a year and one day, upon one *nihil* only, which is the same as no summons, may be set aside for irregularity, or reversed on error, but that the irregularity cannot be noticed collaterally in another suit; and that even if the judgment should for that cause be reversed, or set aside, a purchaser at a sheriff's sale would hold the land. A similar doctrine was laid down by Lord Redesdale in *Bennett v. Humill*, 2 Sch. & Lef. 566, where it was held that a purchaser under a decree should not be affected by error in the decree, in its not having given a day to an infant defendant to show cause.

This doctrine appears to me to be very reasonable, and conducive to the public good. It is intended to impose upon parties the necessity of looking into mistakes in proceedings before they become stale and forgotten; and it tends to quiet purchasers by giving security to judicial titles. The first objection, therefore, to Taylor's title under the execution from the want of a regular revival of the judgment by *scire facias*, falls to the ground.

2. The next obligation is, that the premises did not pass by the sheriff's deed; and here I think the objection is well taken.

The sheriff's deed contains all the evidence we have of the sale; and it recites, that by virtue of the execution, the sheriff seized the tracts and parcels of land therein mentioned and described, and that he exposed the same separately to sale, and sold each of them to John Taylor for fifty pounds, making in the whole one hundred pounds. It then states, that by virtue of the execution, and in consideration of the said one hundred pounds, he conveyed the said two tracts of land by metes and bounds to John Taylor. The deed then adds, by a general clause, these words: "and also all other the lands, tenements and hereditaments, whereof the said William, Earl of Stirling, was seised within the county of Ulster." It was under this general clause that the premises were intended to be conveyed, whereas it would appear from the deed that the levy, and the exposure to sale, and the price bid, applied only to the pieces or parcels of land which were therein mentioned and described. It appears to me to be altogether inadmissible, that the property of a defendant should be swept away on execution, in this loose, undefined manner. It would operate as a great oppression on the debtor, and lead to the most odious and fraudulent speculations. No person attending a sheriff's sale can know what price to bid or how to regulate his judgment, if there be no specific or cer-

tain designation of the property. In this case the price was given for the land described, and not for lands which we are to presume were then wholly and equally unknown to the sheriff and the purchaser. It was the same thing to the purchaser as if no such land existed.

To tolerate such judicial sales would be a mockery of justice. It ought to be received as a sound and settled principle, that the sheriff cannot sell any land on execution, but such as the creditor can enable him to describe with reasonable certainty; so that the people whom the law invites to such auctions, may be able to know where and what is the property they are about to purchase. Perhaps the case may be different if the description in the mortgage be general, and the mortgagee sells under a power, and the mortgagor will not come forward at the sale, and point out and identify the lands. The sale, in such a case, depends upon the contract of the parties; but sales by process of law are under the protection of rules established for the common safety; and I see no possible ground to hesitate concerning the policy or justice of the rule in this case. The title, therefore, set up by the defendants, under the sheriff's deed, totally fails.

3. There was another ground of defense mentioned and discussed upon the argument; and that was, the existence of an adverse possession of twenty years, sufficient to toll the plaintiff's entry. From the time that Miller and the other tenants surrendered their possession to Taylor, to the time of bringing the suit, above twenty years had elapsed, and if the statute of limitations had began to run from the time of that surrender, the lessors of the plaintiff would undoubtedly have been barred. But it did not begin to run, for reasons which I shall presently mention. It has been urged, that there was a suspension of the statute by reason of coverture, rights in remainder, etc.

This, however, is a mistake. There was no disability on the part of Lady Stirling, and she owned the whole estate, in fee, under her husband's will, at the time of Taylor's entry. The devise to her was of "all the real and personal estate whatsoever," etc.; the word estate here carried a fee; and the further provision in the will, that if she died "without giving, devising, selling or assigning it," etc., the estate should go to his daughter, Catharine Duer, was not a good limitation by way of executory devise, as such a limitation was repugnant to the power to sell, and consequently, void. This was the decision of the supreme court in *Jackson v. Bull*, 10 Johns. 19 [6 Am.

Dec. 321], and nothing has been urged to show why that decision is not to be regarded as correct. Lady Stirling was, then, the owner of the equity of redemption, and Miller was her tenant, at the time of the surrender of the possession to Taylor. But the reason why the statute of limitations did not then begin to run against her, is this: that the surrender was not of itself, and without reference to the title of Taylor, a disseisin or ouster sufficient to set the statute in motion. There is no fact found by the special verdict amounting to an ouster, unless it be what is termed in the case the attornment of the tenants, in acknowledging to hold, or accepting leases under Taylor, instead of Lady Stirling. But unless Taylor was lawfully entitled to the possession, this attornment could not, in any way, prejudice the rights of Lady Stirling, and it was of itself null and void. The statute on this subject declares, that no attornment of a tenant to a stranger shall be construed in any wise to have changed, altered or affected the possession of the landlord, except the same be made with the consent of the landlord, or in pursuance of a judgment, or made to a mortgagee, etc. This brings us to the last and main question in the case, and that is, can Taylor's entry be protected under the mortgage from Lord Stirling to Mrs. Waddell? Every other point of defense having failed, the whole cause turns upon the solution of this interesting question.

The will of Mrs. Waddell sets out with a declaration that she disposes of her whole estate, real and personal; and after some specific legacies, she directs her executors to collect all her outstanding debts; and that all the rest of her estate in Hardenberg's patent and elsewhere, whatsoever and wheresoever, be turned by them into money, and be equally distributed among her five children, share and share alike, "who are to be tenants in common in fee of the realty, until such sale and distribution be made." It is very clear to me from this will that Mrs. Waddell did not intend to die intestate, as to any part of her estate. She did not intend that her eldest son, William, and whom she evidently, in the same will, rebukes for his disobedience, should inherit any part of her estate whatsoever, as heir at law, in preference or in exclusion of her other children. She meant that the mortgage debt of Lord Stirling should go as the rest of her estate went. She probably knew nothing of the distinction between a beneficial interest in the mortgage debt, and a dry, technical, legal estate in the mortgaged premises. If the distinction was known to her, she never intended that her eldest son should avail himself of it. If the mortgage was personal

estate, she meant that the executors should take and distribute it; and if it was real estate, capable of enjoyment, and of being devised as such, she meant it to go as part of the realty to her five children equally, as tenants in common. There is no doubt in my mind that this is the fair and obvious intention of the will; for the language is plain and unambiguous, and there is no provision inconsistent with this intention.

We are, however here met with a difficulty which is supposed to be insuperable, and on which the main stress of the argument on the part of the plaintiff was laid. It is admitted that the words of the will are sufficient to pass to the five children all the real estate which Mrs. Waddell held in her own right; but it is said to be a settled rule of law in the construction of wills, that general words, such as lands, tenements and hereditaments, the realty, or other words particularly appropriated to real estate, will not carry an interest in land which the testator holds as mortgagee or trustee; that unless the will specially refers to such an interest, it will not pass by the usual devise of the real estate; and that though, strictly and technically speaking, the mortgagee has a legal estate in fee in the mortgaged premises, yet that estate must descend as undevised property to the heir at law, rather than pass with the rest of the estate by such general words.

If this be the rule of law, whatever we may think of it, we are bound to obey it. On this point I fully agree with the learned counsel for the plaintiff. No man feels more strongly than I do the duty incumbent on every member of this court to declare the law truly and strictly in all our judicial decisions. We sit here, not as a branch of the legislature, but as a court of justice, and we must not in any case set up the authority of our own "right reason," as paramount to the law which we are sworn to administer. But it is unnecessary to press these reflections. I have satisfied myself, and perhaps I may be able to satisfy others, that the rule of law is not as was stated on the part of the plaintiff, but the rule is that the same words in a will which will carry any other estate, will carry, also, the legal estate held in trust under a mortgage.

The latter is, upon the whole, the most convenient rule, though I admit it cannot be very material as it respects the interest of parties, which way the rule is settled, for whoever takes a trust estate, whether it be the heir by descent, or the devisee by will, he must take it as trustee merely, and is equally responsible in the one capacity as the other. But if the public

interest is not much concerned in settling the rule, there is the less reason for refusing to construe the words of will according to their ordinary meaning. Lord Rosslyn has said, 5 Ves. 339, that it would be more convenient that trust estates should pass by general words, because it is more convenient for those who are concerned in the trust to find the devisee than the heir; and if this be the case in England the convenience is vastly increased with us; because in England the eldest male is alone the heir at law, but with us all the children, male and female, inherit together. And if the beneficial interest in the mortgage debt is given to the devisee, the inducement is still stronger to give him the legal estate, for why should the legal and beneficial interest in the mortgage premises be unnecessarily separated? What possible use would there be in allowing the legal estate in the mortgage to descend in this case to William Waddell, the heir at law, when he would as heir be only a mere naked trustee for those who were entitled to the beneficial interest in the mortgage debt under the will? It would be far better, on the score of convenience and simplicity, to let the legal and equitable interest under the mortgage go together, as they in fact existed together in the person of Mrs. Waddell at the time of her death.

The rule, as now settled, is this, that trust estates will pass by the usual general words in a will passing other estates, unless it is to be collected from the expressions in the will, or the purposes and objects of the testator, that it was his intention they should not pass. This was the rule as declared by Lord Ch. Eldon, in *Braybrooke v. Inskip*, 8 Ves. 407, after much examination and reflection. In that case A. held land in trust, and by will devised all his real and personal estate whatsoever, etc., to his wife, and it was held by the master of the rolls, and afterwards by the lord chancellor, that the legal estate in the trustee passed by this general devise. The lord chancellor said this was a question of intention of the testator, and the weight of convenience was in favor of the rule. The will was large enough, and there were no expressions in it authorizing a narrower construction, and no purpose inconsistent with an intention to pass the trust estate to the devisee. He said there was no case establishing a different rule; and that, if there was any such case, he would abide by it. The rule according to the old cases unquestionably was, that a trust estate would pass by general words.

This is the final decision in the English courts, on the very

point which has been raised and discussed in this place; and after the decided opinion of so laborious and able a lawyer as Lord Eldon, we may well doubt whether the learned counsel for the plaintiffs have not been mistaken in their apprehension of the rule of law. It is admitted, on all hands, that a mortgagee holds the mortgaged lands in trust; and when it is said that a devisee of real property will ordinarily pass a trust estate, all the cases consider it as applying as well to a mortgagee as to any other trustee; and indeed, it applies the stronger to that case when we find that the devise does actually pass the beneficial interest in the mortgage debt.

The case of *Roe ex dem. Reade v. Reade*, 8 T. R. 118, in the K. B. declares the same rule. A., having estates of his own, and having another estate which he held as a mere naked trustee, without any interest, devised all his estate, whatsoever and wheresoever, after payment of debts and legacies. The question was here between the heir and devisee, which of them took the trust estate, and the K. B. put it entirely on the ground of intention. The general words seem, both by the counsel and the court, to have been admitted to be sufficient to pass the trust estate, but as the testator had here charged all his lands devised with the payment of debts and legacies, it was decisive evidence that he did not intend to pass the trust estate by that will, because he had no right to charge it with such payment; and as the intention in this case was manifest, for that reason, and that reason only, the trust estate was held not to pass. So, in another case, *Ex parte Morgan*, 10 Ves. 101, Lord Eldon held, that where a mortgagee had devised all his real estate charged with an annuity, it could not be considered as his intention to pass the mortgage estate, because that estate was not his own. He only held it in trust for a special purpose, and he had no right to charge it with an annuity.

Here, then, we have the decisions of the courts of law and equity in England, uniting in the rule as I have stated it; and if we go back, as Lord Eldon did, to the old cases prior to the revolution, and which are to be received strictly as authority, we shall find them containing and expounding the same doctrine.

I begin with the case of *Winn v. Littleton*, 1 Vern. 3; 2 Chan. Cas. 51, decided as early as 1681, by Lord Nottingham, whom Sir Wm. Blackstone always mentioned with the reverence due to the father of the English system of equity jurisprudence. The testator in that case was seised of divers lands in his own

right, and divers lands in his own right by specific designation, and adds, or elsewhere within the kingdom of Wales, and he charged his lands devised with a rent charge for life. The question was, whether the lands held in mortgage passed by the will, and it was held that they did not, because it appeared not to be the testator's intention, as he made special mention of his own lands, and not of the other. But another and a stronger reason was assigned by the court, and this was, that the testator had charged the lands that passed by the devise with a rent charge for life, and he could not be thought so improvident as to grant a rent for so great an estate, and of so long a continuance as for life, out of mortgage lands, which were every day redeemable. This decision places the question, whether a trust estate will pass by general words, on the same ground that it was placed by Lord Eldon, one hundred and twenty years afterwards. It is a question altogether of intention, and to be gathered from the scope and design of the whole will. If the intention be not otherwise pretty clearly expressed, and it be not inconsistent with the nature of the other provisions in the will, the understanding is that the trust estate will pass.

The case of *Marlow v. Smith* was the next decision on the point: 2 P. Wms. 198. It was decided in the time of Lord Macclesfield, in 1723. The testator devised part of his estate to A., and all the rest and residue of his estate to B. It was held by the master of the rolls that the land which he held as a bare trustee passed by these latter words, for the legal estate was his estate in the eye of the law; and there was, it was said, no inconvenience in this construction, for the devisee would be equally a trustee. So, again, in the modern case, *Ex parte Serghison*, 4 Ves. 147, the master of the rolls, afterwards Lord Alvanley and Lord Rosslyn, were both inclined to the opinion that a mortgage estate would pass by general words in a will, such as all the rest, residue and remainder of my estate, real and personal, of what nature or kind soever. In addition to this weight of authority, I might add the opinions of Mr. Butler, in one of his notes to Coke on Littleton, Co. Lit. 203 b, n. 96, and of Mr. Sanders in his note to 1 Atk. 605, and both these writers bestow some pains on the question, and each cites a case to the same effect, and not elsewhere reported.

Then what are the authorities on which the counsel for the plaintiff have relied? We may well ask this question after the cases which have been mentioned, and after Lord Eldon has said that he knew of no case against the general rule which has

been stated. They rely in the first place on a loose observation in the case of *Strode v. Russell*, in 1708, 2 Vern. 621, in which it is stated to have been agreed by the chancellor, assisted by the master of the rolls and two judges, that mortgages in fee, though forfeited when the will was made, did not pass by the general words.

There is nothing in the case to the point but this single observation, and Mr. Sanders, in the note to which I have alluded, says that this case affords no argument on either side, as the decree takes no notice of any mortgages except those whereof the testator had, after the making of the will, purchased the equity. The next authority, more confidently relied on, is an observation of Lord Hardwicke in *Casborne v. Scarfe*, 1 Atk. 605, in which he says that by a devise of all lands, tenements and hereditaments, a mortgage in fee will not pass, unless the equity of redemption be foreclosed. This does not appear to have been the point in the cause, and it is rather to be considered as an extra judicial *dictum*; and Lord Eldon declared, 8 Ves. 436, 437, that he did not believe Lord H. ever said so. And when this *dictum* was cited in another case, 4 Id. 149, the then solicitor-general, Sir John Mitford, told the court that Lord Northington and Lord Thurlow had overruled that opinion.

Another case relied on by the plaintiff's counsel is that of the *Duke of Leeds v. Munday*, 3 Ves. 348, in which the master of the rolls, Lord Alvanley, is made to concur in opinion with Lord Hardwicke. We find, however, that he afterwards declared, 5 Ves. 341, note, that the opinion imputed to him in this case was not correct; and that he did not mean to decide the question, but made a conditional decree on account of his doubts. The last case mentioned is that of the *Attorney-general v. Buller*, 5 Ves. 839, in which Lord Rosslyn seems to intimate that a trust estate will not pass by general words in a will; and yet, strange as it may appear, he afterwards said, 8 Id. 437, that he was overborne in that case by some observations of the attorney-general, and that his opinion was rather with Lord Eldon.

On reading these latter cases, we are almost involuntarily led to pause and wonder at the extraordinary and very unaccountable perplexity, doubt and alternation of opinion which they discover on this point. The learned men referred to in these cases do not appear to me (with all proper humility be it spoken), to have examined this question with the diligence or the talent worthy of the eminent reputation they bear. If, indeed, they did, the reports have done them great injustice. Lord Eldon

had studied the question with profound attention, and he showed it to be perfectly clear and settled; but in the other modern chancery cases on this point, we find nothing but what tends to expose the inefficacy of legal learning and the weakness of human reason.

I have thus finished a review of all the material cases on the subject, and if the court have had the patience to attend to this dry detail, I presume they must be satisfied that there is no technical rule of law to withstand the intention of the will. And when Mrs. Waddell directed that all the rest of her estate in Hardenbergh's patent and elsewhere, whatsoever and wheresoever; should be turned into money and distributed among her five children, who should be tenants in common in fee of the realty, until such sale and distribution be made, she intended that her legal and beneficial interest in the mortgage debt and premises should pass with the rest of her estate. It follows then, of course, that John Taylor was authorized to enter under the mortgage in right of his wife and of Mrs. Miller, two of the daughters of Ann Waddell, and that the notion of an illegal and fraudulent attornment to Taylor is totally without foundation. We may consider his possession as the possession of all the claimants under the will.

Even, if the technical legal estate in the mortgage had descended to the heir, he would have been but a mere trustee for all the children to whom the beneficial interest was devised, and they would have been entitled to use his name to recover the money, or to foreclose the mortgage, or to gain possession. This was so declared by Sir John Strange in the case of the *Attorney-general v. Meyrick*, 2 Ves. 44. And though it is not now necessary to give any opinion on that point, I should incline to think that even in that case the children of Mrs. Waddell could protect themselves in the entry and possession under the mortgage. But I need not pursue the subject further. I have examined the case on every point, and am of opinion that the judgment of the supreme court ought to be affirmed.

This being the unanimous opinion of the court, it was, therefore, ordered and adjudged that the judgment given in this case be affirmed and the record remitted, etc., and that the plaintiffs in error pay to the defendants in error their costs, to be taxed, etc.

By Court. Judgment affirmed. A motion was made on the part of the plaintiffs in error for double costs.

KENT, Chancellor. The fourteenth section of the act concerning costs, applies only where the writ of error is sued out by the defendant below. That section is a transcript of the statute of 13 Car. 1, and such has always been the construction of it: *Hullock on Costs*, 280, 281. The decision of the supreme court in *Peters v. Henry*, 6 Johns. 278, is to this point. The fourteenth section gives double costs for delay of execution, and that is understood to apply only when the plaintiff below recovers. The defendants are entitled to single costs only, under the twelfth section of the act.

By Court. Single costs only awarded.

MANN v. MANN.

[14 JOHNSON, 1.]

PAROL EVIDENCE TO EXPLAIN WILL.—Parol evidence can be admitted to control the terms of a will only in two cases, namely, to explain a latent ambiguity, and to rebut a resulting trust.

BONDS, MORTGAGES AND NOTES NOT MONEY.—The testator having devised to his wife "all the rest, residue and remainder of the moneys belonging to his estate at the time of his decease," it was held the word "moneys" must be taken in its ordinary signification, and could not include bonds, mortgages, or other choses in action, as there was nothing in the will showing that the testator intended to use the term in any other than its ordinary sense.

BILL filed by the plaintiffs, heirs and residuary legatees of David Mann, deceased, against his widow and executors. The testator, after directing payment of debts, gave a legacy to his niece, Mary Connel, payable out of his personal estate, and then devised to his wife, her heirs and assigns forever, certain lands, and also bequeathed to her "all the rest, residue and remainder of the moneys belonging to his estate at the time of his decease," and also his negroes, horses, stock, etc., declaring it to be in lieu of dower. He gave his niece, Mary Holford, five hundred dollars, to be paid out of the proceeds of the sale of the residue of his real estate. He devised to the children of his brother Michael and his daughter Mary, and to the children of his brothers George and Mathias, and their heirs, etc., "all the rest, residue and remainder of his estates, real and personal, or the moneys arising from the sale thereof, equally to be divided between them, share and share alike." He empowered his executors to sell his real estate, and appointed his wife executrix. The testator was seised in fee of other lands in

fee, and was possessed of bonds, mortgages, and other securities, not specifically disposed of. The material question presented was whether the widow is entitled to the securities, bonds, mortgages, etc., under the will, or whether they should go to the residuary legatees.

Harrison and Robinson, for the plaintiffs in the court of chancery.

T. A. Emmet, contra.

The decree of Chancellor Kent is reported from 1 Johns. Chancery.

In the court of errors the case was argued by *Van Vechten and Emmet*, for appellants, and *Robinson and Oakley, contra.*

KENT, Chancellor. The question here is, whether under the bequest of "all the rest, residue and remainder of the moneys belonging to my estate at the time of my decease," the widow be entitled to anything more than the cash which the testator left at his death, or whether, as the defendants have contended, she be entitled also to the bonds, mortgages and notes.

This question has led to another, and that is, whether the parol evidence offered be admissible to explain the testator's meaning. It is a well settled rule, that seems not to stand in need of much proof or illustration, for it runs through all the books, from *Cheyney's case*, 5 Co. 68, down to this day, that parol evidence cannot be admitted to supply, or contradict, enlarge or vary, the words of a will, nor to explain the intention of a testator except in two specified cases: 1. Where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; and, 2. To rebut a resulting trust. All the cases profess to proceed on one or the other of those grounds: *Hodgson v. Hodgson*, Prec. in Chan. 229; 2 Vern. 593; *Pendleton v. Grant*, 2 Vern. 517; *Harris v. Bishop of Lincoln*, 2 P. Wms. 135; *Beaumont v. Fell*, 2 Id. 140; *Hampshire v. Pierce*, 2 Ves. 216; *Urich v. Litchfield*, 2 Atk. 372; *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 188. Lord Eldon in *Druce v. Denison*, 6 Ves. 197.

If there be a mistake in the name of the legatee, or there be two legatees of the same name, or if the testator bequeath a particular chattel, and there be two or more of the same description, or if from any other misdescription of the estate, or of the person, there arises a latent ambiguity, it may and must be explained by parol proof, or the will would fall to the ground for

uncertainty. When a latent ambiguity is produced, according to the language of the courts, Lord Thurlow in 1 Ves. jun. 259, 260, 415, and Lord Kenyon in 7 T. R. 148, in the only way in which it can be produced, viz., by parol proof, it must be dissolved in the same way, and there is no case for admitting parol evidence to show the intention upon a patent ambiguity on the face of the will. They are all cases of latent ambiguity, and the objection to supply the imperfection of a written will, by the testimony of witnesses is founded on the soundest principles of law and policy. "It would be full of great inconvenience," say the justices in *Cheyney's case*, "that none should know by the written words of a will, what construction to make or advice to give, but that it should be controlled by collateral averments out of the will." And if collateral averments be admitted, to use the words of Sir Mathew Hale in *Fry v. Porter*, 1 Mod. 310, "how can there be any certainty? A will may be anything, everything, nothing. The statute appointed the will to be in writing, to make a certainty, and shall we admit collateral averments and proofs, and make it utterly uncertain?" In a still later case: 3 P. Wms. 354, Lord Talbot observed, that if we admit parol proof, "then the witnesses, and not the testator, would make the will." And he spoke with equal decision in the case of *Brown v. Selwyn*, Cas. Temp. Talbot, 240; though the parol proof, in that case, would have left no doubt of the intention of the testator being contrary to the legal operation of the will. This case comes with the more weight since the decree was affirmed in the House of Lords, 4 Bro. P. C. 179, who would not suffer the parol evidence to be read, nor even the answer as to that matter.

Perhaps a solitary *dictum* may occasionally be met with, for there are volumes of cases on the subject of wills, *immensus aliarum super alias cumulus*, in favor of the admission of parol proof, to explain an ambiguity of uncertainty, appearing on the face of a will, though Lord Thurlow says there is no such case. If there be, we may venture to say, it is no authority. If a will be uncertain or unintelligible on its face, it is as if no will had been made. *Quod voluit non dixit*. We ought not to forget, that no verbal or non-cupative will is good, within the statute of frauds, except under special circumstances, and that no will concerning any personal estate, and of that we are now speaking, shall be revoked or altered, by any words, or will by word of mouth only: Laws sess. 36, ch. 23, secs. 14, 15, 16. The only apology for parol proof, in any case, is the necessity of the

thing, because the ambiguity is so complete as to elude all interpretation, and would destroy the devise altogether, unless explained. But here is no such difficulty, and no such necessity for resorting to parol proof. The word moneys will apply beyond all doubt, to the cash which the testator left at his death, and the bequest has at all events a certain and definite subject on which it can operate.

In the late case of *Doe v. Oxenden*, 3 Taunt. 147, the court of C. B. considered this fact as a very material circumstance, and one which made the case to differ from all others on the subject of explaining a will by parol proof, because in all cases that had been before the evidence was admitted to explain a part which, without such explanation, could have had no operation. But in that case, as there was sufficient to satisfy the devise according to the ordinary meaning of the description, collateral evidence to show that the testator meant to use the description, in a more extensive sense, was rejected. There was a similar decision in *Doe v. Brown*, 11 East, 441, and the two cases are strong in respect to this point.

My conclusion is, that the parol proof cannot be received or permitted to enter into the consideration of the case; for it will readily be admitted, that to serve the particular purpose, or meet the supposed hardship of an individual case, we ought not to break in upon the established principles of law. The observation of Lord Talbot, in one of the cases referred to, contains the true and wise doctrine, on this subject, that it is better to suffer a particular mischief than a general inconvenience. The only question, then, in this cause is on the construction of all the will itself.

I do not perceive, from a perusal of the will, any reason for construing the word moneys, beyond its popular and legal meaning. It means gold and silver, or the lawful circulating medium of the country: Co. Lit. 207 a. It may be extended to bank notes, when they are known and approved of, and used in the market as cash. Perhaps it would be proper to extend the term to money deposited in bank, for that is cash, and considered and used as cash placed there for safe keeping, in preference to the chest of the owner. It was mentioned by the counsel in the recent English case of *Hotham v. Sutton*, 15 Ves. 319, that under a bequest of "money," money and bank notes, in the possession of the testator, or at his banker's, will pass, and nothing else, and they said it had always been so considered; and the chancellor observed that stock never passed by the

word money. Beyond these bounds the word cannot be extended, unless it be accompanied with explanations, showing that the testator alluded to other property than his cash, and defining that property as money at interest, on bond and mortgage, or money in the public funds. If he uses the word absolutely, without any such accompanying qualification or reference, it cannot be construed beyond its usual and legal signification, without destroying all certainty and precision in language, and involving the meaning of the will in great uncertainty. The difficulty would be to know what precise check to give to the force of the term, after we have once moved it from its seat. *Vires acquirit eundo*. Shall it be confined to any particular species or description of choses in action? Or shall it embrace promiscuously every species of debt and security—book debts, notes, bonds, mortgages, judgments, turnpike, manufacturing, insurance, bank and national stock? Or must we go into a difficult inquiry to ascertain which of these securities was taken for cash lent, and which for goods or lands sold, or services rendered, and which as a compensation for torts, or other causes of action?

It appears to me that it would contravene the rules of law, and the policy of the statute be of dangerous consequence, to depart from the common and fixed meaning of the word moneys, and which meaning the testator must be presumed to have understood, especially as the bequest will still be effectual and productive. The cases of *Rose v. Bartlett*, Cro. C. 292, and of *Day v. Trig*, 1 P. Wms. 286, may be cited to show that where a will can have effect, words are not to be strained to enlarge the will; and that a lease for years will pass under a devise of all my lands, if the testator had no fee-simple estate, and this in order to prevent the devise from being void; but if he had an estate in fee, the chattel interest will not pass. The testator in the present case understood how to explain the word moneys when he meant to designate other property than his cash in hand. He uses it repeatedly in the subsequent parts of the will, but it is always with a clear and certain reference to the subject-matter to which it is to be applied, as when he discharges his brother Michael “from the payment of all moneys which he shall owe to me at my decease,” and when he bequeaths to the children of his brothers the remainder of his estate, “or the moneys arising from the sale thereof.”

There is a settled distinction on this subject of the construction of wills, between cash or money, and choses in action; and

this increases the difficulty of the attempt which has been made to confound them. Thus cash will pass by a bequest of movables; but the better opinion, according to Godolphin (*Orphan's Legacy*, p. 417, s. 9), is that money at interest will not so pass, because it is a debt, and not cash. So a devise of goods and chattels in such a place will not include a bond being there, as it has no locality; but it will include cash, and also bank notes, because they are considered *quasi* cash: *Chapman v. Hart*, 1 Ves. 271; *Moore v. Moore*, 1 Bro. 127; *Fleming v. Brook*, 1 Sch. & Lef. 318.

Nor is there any reason to infer from the will, that due provision is not made for the widow, without permitting her to sweep away, under the denomination of money, all the notes, bonds and mortgages belonging to the testator. The testator gives her in fee his dwelling-house and six acres of land lying on the Bowery road, in the city of New York. He also gives to her in fee two other lots in the same place, containing an acre and a half; and he further gives her all his household furniture, horses, farming stock, etc. The expression of all the rest, residue and remainder of the moneys, etc., belonging to his estate, leaves the question of construction precisely the same as if those words had not been used, for the question still occurs, what were his moneys? The words rest, residue, etc., seem to be without use or meaning, as there used, for there were no moneys previously alluded to, except the one thousand dollars bequeathed to his niece Mary, and that sum was to be paid at large out of his personal estate; and it is not contended that the word "moneys" can have such an extensive sense.

The result of my opinion is, that the execution must account to the plaintiffs for the bonds, mortgages and notes left by the testator, and a reference must be made to a master, to take and state an account between the parties, in which the defendants must be allowed for whatever payment and expenses are justly chargeable to the property, and be chargeable with all the securities aforesaid, and the question of costs, and all other questions, to be reserved until the coming in of the report.

Decree accordingly.

THOMPSON, C. J. The decision now to be made does not depend so much upon ascertaining and defining the rules and principles of law, involved in the discussion, as in a just and correct application of those rules and principles to the case before us. That the intention of the testator is to be sought after, and carried into effect; that such intention is to be collected from the

will itself, unaided by any extrinsic evidence except in the case of a latent ambiguity, or to rebut a resulting trust; and that no parol evidence is admissible to contradict, enlarge or vary the words of a will, are general rules so well settled that they may be assumed as elementary principles of law. A correct application of them to this case will, in my judgment, lead to an affirmance of the decree.

The particular clause in the will of David Mann, upon which the question turns, is in these words: "I do give and bequeath unto my said wife, Mary Mann, all the rest, residue and remainder of the moneys belonging to my estate at the time of my decease." Whether, under this bequest, Mary Mann is entitled to all the bonds, mortgages, notes, and choses in action belonging to the estate of the testator, or only to the cash left, is the question between the parties. It was not pretended by the appellant's counsel that there was any ambiguity or uncertainty in the term "moneys." Indeed, such a pretense would have been utterly inconsistent with the claim to let in parol evidence; for if there was any such uncertainty, it would have been a patent ambiguity, which is, confessedly, not explainable by extrinsic evidence. But it was contended that the qualifications accompanying and superadded to the term "moneys," either showed that the testator intended to use it in a sense different from the ordinary or legal acceptance, or referred to a fund other than that created by his cash.

In examining into the intention of a testator, in any particular clause of his will, it is no doubt proper to gather all the light that can be thrown upon it, by comparing and explaining it with other parts of the will, so as to make the whole consistent, and all the provisions, if possible, harmonize together. But when we are collecting the intention of the testator from the will itself, we ought to guard against the influence which the extrinsic evidence offered may have upon the mind, if such evidence was admissible. In courts of equity those parol proofs are generally permitted to be read without prejudice, subject to all just exceptions. But at law, where the jury might and probably would be influenced by the influence of improper evidence, the production of it will not be allowed: *Prec. in Chan.* 104.

Let us, then, look at the will *per se*, as if no parol evidence had been offered, and see whether a doubt could exist as to the construction of this will. If we had never heard that the testator had money out at interest upon bonds and mortgages,

could it enter into the mind of any man, upon looking at the clause in the will under consideration, that moneys meant anything more than cash, or that it would extend to choses in action? It has, however, been said that the words "rest, residue, and remainder," are relative terms, referring to an antecedent, and which antecedent must have been a fund, not coming within the ordinary acceptation of the term "moneys." That they are relative terms is undoubtedly true; but the conclusion attempted to be drawn from this by no means follows. The testator previous to the clause in question had directed all his just debts and funeral charges to be paid, and had bequeathed to his niece one thousand dollars. His debts and funeral charges are not directed to be paid out of any particular fund. The moneys left by him would be the fit and proper fund to be resorted to for the purpose, and the one most likely to be in view by the testator, especially as the funeral expenses would require an immediate expenditure. The words "rest, residue and remainder," are therefore satisfied by referring them to the money as the fund. But the legacy to Mary Cornell is expressly directed to be paid out of his personal estate. And it would be a very strained interpretation to say that the testator used the words "personal estate" in the same sense as the term "moneys;" and unless he did, this legacy could not have been intended to be charged upon the money fund. His charging this legacy upon the personal estate generally shows that when he used the word "moneys," he meant and intended to use it in its usual and ordinary acceptation. Suppose the testator had left cash sufficient to pay his legacy, over and above his debts and funeral expenses, and had left other personal estate sufficient to pay the legacy; can there be a doubt but that the money would have been considered as a specific bequest, and the legacy chargeable upon the other part of the personal estate? The words "rest, residue, and remainder," are therefore satisfied by referring them to his cash, the natural fund for payment of debts and funeral expenses, where no specific directions are given.

There is nothing whatever in the will requiring or even affording a rational conclusion that the legacy to Mary Cornell was intended to be charged upon the cash fund. Nor has the testator, in any part of his will, used the term "moneys" in any other than its ordinary and appropriate sense. Thus, in relation to his demand against his brother Michael, he discharges him from the payment of all "moneys" which he shall owe him

at time of his decease. This necessarily and unavoidably refers to an outstanding debt. When we speak of the payment of money which one owes, it is impossible to misunderstand, or to give any other interpretation to the expression than as having reference to a debt due. So, where he speaks of the "moneys" arising from the sale of his real and personal property, he uses the term in its ordinary acceptance. Again, he authorizes his executors to sell his real estate for the most "moneys" that can be got for the same, which is as apt and appropriate a use of the term as could be made. These are all the instances in which the word "moneys" occurs in the will, and in no one of them is there an ambiguous or unusual meaning attached to it, clearly showing that the testator used the term understandingly, and not in any doubtful sense. If so, it is utterly inconsistent with the sound and settled rules of interpretation to give to this term a broader operation than its legal or popular meaning requires.

It was urged, however, in argument that the qualification superadded to the term "moneys," namely, "belonging to my estate," shows that the testator intended to use it in a more enlarged sense than its ordinary acceptance, and showing also a misdescription of the fund referred to. If the description was inapplicable to the subject, or thing bequeathed, there would be force in the argument; but that is not the fact. It is just as fit and proper to say the "moneys" (meaning cash) belonging to my estate, as to say the bonds and mortgages belonging to my estate. The description is equally applicable to both. The one belonged to his estate as much as the other. Indeed, if the description was false and inapplicable to the subject, the settled rule of construction requires a rejection of the description, when the thing devised or bequeathed is certain: 11 Johns. 218. But there is no necessity of applying this rule. There is no misdescription. The "moneys" did belong to his estate; so that, although the description may be surplusage, it is true in point of fact. Is it not reasonable to presume that if the testator had intended, by this residuary bequest, anything more than his cash, he would have used some more appropriate language? The whole will shows that he understood the force and meaning of terms; and if he had intended, when he made his will, to extend this bequest to his bonds, mortgages, notes and choses in action, it is inconceivable why he did not adopt some expression indicating such intention as "the moneys due me," "my moneys at interest," or the like. Such would have been the natural and obvious phraseology.

There is no force in the criticisms which have been made upon the word moneys as being of more extensive signification than money. In the statute book and in common parlance they are used indiscriminately as conveying the same sense and meaning.

It was very much pressed on the argument, that unless the word moneys was extended beyond the cash fund, there would be a failure of the bequest. And, in order to give much force to this argument, it was assumed that the thousand dollars legacy to Mary Cornell was charged upon the fund, of which the testator gave his widow the rest, residue and remainder. But I have shown that that is not the case. The legacy to Mary Cornell is expressly charged upon the personal estate generally. It is true that where there is a specific legacy charged upon a fund of any way doubtful description, that construction will be most favored which will prevent a total failure of the bequest. This is the leading principle which runs through the cases cited upon this point in the argument. But the principle does not apply here in its full force. There is no specific sum bequeathed to the widow by this clause in the will, and there is nothing from which it can be determined how much he intended to give her. Where there is a specific sum named, the extent of the testator's bounty is defined, and his will known, and it is the duty of courts to search for a construction that will carry it into effect. A general residuary clause is very often thrown into a will without much calculation as to its being very beneficial. It is certainly a pretty far-fetched inference that this was to be the fund for the support and maintenance of the widow. I can discover nothing in the will intimating such an object, particularly by this clause, especially as such very ample provision had been made for her in the clauses immediately preceding. There is no more reason to conclude that the moneys were intended for her support than for the purpose of building houses upon the lots he had given her. If all his outstanding debts passed under this clause to his widow, then she would take all the personal estate; for the specific legacies to her of his household furniture, farming stock, etc., swallowed up all the residue of his personal estate; and the subsequent clause, giving to the children of his three brothers, the rest, residue and remainder of his estates, real and personal, would so far as respected the personal estate be nugatory. It is not reasonable to presume that if he had disposed of all his personal estate before, he would have again included it in this devise, and

mentioned so emphatically as one of his estates. It is one of the settled rules in the construction of wills, so to interpret each part as to give effect to the whole, when it can be done, which would not be the case if the widow is to take all the outstanding debts. The residuary bequest of his personal estate would be senseless, having nothing to operate upon, and the testator knowing it to have been previously disposed of.

Construing the will therefore by itself, I can see no ground for extending the term "moneys" to all the debts due the testator, and it must have this extent if at all reaching a chose in action. The term is, if possible, less applicable to a bond than to an account, especially if it was for money lent. And indeed, if we go beyond the legal or popular signification of moneys, it must be extended to all claims sounding in contract.

I shall very briefly notice the question as to the admissibility of the parol evidence. This is in a great measure involved in the consideration of the other question. There is certainly no resulting trust to be rebutted, so as to let in parol evidence on this ground; and I have endeavored to show that there is no latent ambiguity calling for explanation by extrinsic evidence. The testator has used plain, intelligible and appropriate terms. By applying the provisions in his will to the situation of his property at the time of his death, there is nothing from which it can be inferred that there is a misdescription of the fund referred to in this clause in the will. Every provision in it is satisfied by giving to the words their usual and ordinary signification. To admit the parol evidence offered of the declarations of the testator, would be direct infringement of what has been for centuries considered a settled rule, that no parol evidence can be received to supply, vary, contradict or enlarge the words in a will, except in the cases mentioned, of which the present is not one. I agree with Lord Ellenborough, that it would be going farther than any case I am aware of, and a dangerous precedent, to admit evidence of intent, from extraneous circumstances, to extend plain and unequivocal words in a will.

The inquiry into the situation of the testator's property, admitting we were authorized to notice it, would not in any manner explain his intention with respect to his choses in action. Such intention would still be left to be collected from the will itself. To receive the verbal declarations of the testator to contradict or enlarge the plain and obvious import of his written language, would not only be repugnant to the most sound and salutary rules of law and an alarming precedent, but would

infringe upon the spirit and policy of the statute, which declares that no will in writing concerning any personal estate shall be repealed, or any part thereof revoked or altered by any words, or will, by word of mouth only: 1 N. R. L. 367. I am accordingly of opinion that the decree ought to be affirmed.

This being the opinion of a majority of the court, six senators dissenting, it was thereupon ordered, adjudged and decreed, that the decree of the court of chancery in this cause be affirmed, and that the appellants pay to the respondents their costs to be taxed, and that the record be remitted, etc.

PARKHURST v. VAN CORTLAND.

[14 JOHNSON, 15.]

SPECIFIC PERFORMANCE DEPENDING ON PAROL EVIDENCE.—Where parties entered upon land under a license from the owner, who afterwards gave them a memorandum in writing whereby he promised to sell to them the premises or give them a lease in fee, and it appeared that these parties were induced to make valuable and permanent improvements, relying upon the representations of the owner that no advantage would be taken of them, it was held that although the memorandum was in itself uncertain, yet as the conduct of the owner was fraudulent as to the parties entering on the premises, parol evidence might be connected with the memorandum to establish a contract, and that a specific performance thereof would be decreed.

APPEAL from the court of chancery. The appellants filed their bill, setting out that in April, 1797, they entered upon certain lands with the permission of the respondents, who agreed to sell or lease the same to the complainants as soon as partition should be made of a tract of land of which these premises were a part; that to secure complainants, the respondent executed the following memorandum in writing: "Messieurs John Parkhurst, Frederick Parkhurst, and Abel Parkhurst have applied to me for leave to possess my lot number four in the second allotment of Oriskany patent, which contains, by the late James Cockburn's survey, seven hundred and forty acres. I have accordingly given them leave, and promised them, as soon as I can obtain a release from Mr. Clarke's heirs for said lot, to give them the preference, either to purchase or take a lease for said lot. April the seventh, 1797. August V. Cortland." The bill further alleged that the respondent, to induce complainants to make permanent improvements, promised to sell the premises for their value at the time of the contract, estimating the

lands as wild lands, with interest until the time of the conveyance, or to lease the same in fee according to the customary rents of the country; that complainants, relying upon these promises, made valuable improvements, having cleared one hundred acres thereof, planted orchards, erected buildings, etc.; that after partition was made, complainants applied to respondent to fulfill his contract, but that he said he was unable then to do so, on account of some dispute among the claimants to the tract, promising, however, to perform as soon as he was able. The bill then set out certain transactions between the complainants and the respondent, and alleged that the latter had commenced an action in ejectment to recover the premises, and concluded with a prayer for specific relief, etc.

The respondent replied that he made no other contract than as contained in the memorandum, admitted the proceedings in ejectment, and relied upon the statute of frauds. The evidence adduced at the trial appears from the opinion.

LANSING, Chancellor, before whom the case first was heard, pronounced a decree in favor of the complainants, that they receive a lease in fee upon the customary rents. Upon a rehearing before KEET, Chancellor, the former decree was set aside, and an order entered referring the case to a master to state an account of the rent in arrears and mesne profits received by the complainants, making them an allowance for beneficial and lasting improvements on the premises. From this decree the appeal was taken.

N. Williams, for the appellants.

P. A. Jay and T. A. Emmet, contra.

THOMPSON, C. J. It was not pretended upon the argument that this was a case coming within the statute of frauds, or that any note or memorandum in writing was necessary for the purpose of making out a valid and binding contract between the parties. The appellants, in the court of chancery, bottomed their claim to relief upon a part performance of an agreement alleged by them to have been made with the respondent, in relation to the lands in question. If any authority was necessary to show that such cases are not within the statute of frauds, we have it in the case of *Brodie v. St. Paul*, 1 Ves. jun. 333, where Buller, J., sitting for the lord chancellor, lays it down as a settled rule in equity, that part performance of a parol agreement takes it out of the statute of frauds. The object of the bill, in the case now before us, was a specific performance of an agree-

ment. This necessarily presupposes the existence of such agreement, and the bill, therefore, as it must in all cases of this description, sets out what the agreement was. It accordingly became necessary for the appellants to prove the agreement with all requisite certainty, or to furnish such evidence as to warrant the court in presuming the agreement which they claimed to be in force. In *Forster v. Hale*, 3 Ves. jun. 712, the lord chancellor observed that he thought courts had gone too far in admitting part performance and other circumstances to take cases out of the statute of frauds. Part performance, said he, might be evidence of some agreement, but of what must be left to parol proof. It would, he thought, have been better in such cases to have the money laid out or repaid, than to consider part performance evidence of an unknown agreement. Here is a full recognition of the principle, that from the fact of part performance an agreement may be presumed. And the same lord chancellor, in another case, 3 Ves. jun. 320, observes that the fact of some agreement may be implied from circumstances. If, then, from the fact of part performance, we are authorized to presume some agreement between those parties in relation to the land, what that agreement was may be collected, with all reasonable certainty, from the parol proof.

I agree fully with the reasoning of the chancellor upon the insufficiency of the memorandum of April, 1797, to ascertain and define the terms and nature of any contract. It is too vague and indefinite for that purpose; nor, according to my understanding of it, was it ever intended for any such purpose. There is nothing in it which looks like fixing or defining a bargain, as to the purchase or leasing of the lands. It purports only to give permission to the appellants to possess the lands, subject to some future arrangement as to the purchasing or leasing the same; they, however, by such possession gaining a preference, or what is usually called a refusal, of such bargain. If the appellant's claim, therefore, rested upon this memorandum alone as the evidence of the contract, I should have no hesitation in saying it could not be supported.

Nor is it to be disputed that where it is necessary to make out a contract in writing, no parol evidence can be admitted to supply any defects in the writing. It is a sound and salutary rule that a contract cannot rest partly in writing and partly in parol; but the case before us is not one falling within either of these rules. It was not necessary that the contract should be in writing; nor does it require that the memorandum in writ-

ing should be connected with the parol proof for the purpose of making out the contract. If my construction of the memorandum is right, it does not profess to make any part of the agreement for the purchase or leasing of the premises. The principal object was to show that the possession was taken with the assent of the owner of the land, and that the appellants were not intruders. That is all the purpose for which it is necessary to use this memorandum; and if this permission had been given by parol, it would have been of equal force with the written memorandum. But if this memorandum is nugatory and void for uncertainty, we may surely reject it altogether, and rest entirely upon the parol proof, as it is a case where no writing was necessary. There are not, however, wanting the opinions of very able chancellors in support of the position; and it is perhaps the better opinion that, where part performance is made the basis of the claim for a specific execution of an agreement, parol proof may be connected with written evidence for the purpose of making out the contract.

The case of *Allen v. Bower*, 3 Bro. C. C. 149, is directly in point on this question. That was a bill for a specific performance, and the evidence to establish the agreement was partly written and partly oral. The written promise of a lease was imperfect, and parol evidence was admitted, by direction of Lord Thurlow, after it had been rejected by a master, to supply the defects in the writing. Lord Redesdale, in commenting upon this case, and particularly upon the question whether a defective writing can be supplied by parol, observes that this cannot be done when the writing is set up as the sole foundation of the agreement, nor unless it be a case of part performance: 1 Sch. & Lef. 37. It is fairly to be collected from his opinion, that in such cases, parol and written evidence may be let in to make out the contract.

But laying aside the written memorandum altogether, let us examine the proofs in the case, and see whether an agreement for a deed or a durable lease is not satisfactorily made out; and it ought here to be noticed, that the bill in chancery seems to be framed upon an agreement distinct and independent of the memorandum. We have not the bill set out at large in the case, but according to the statement given, it appears that after setting out the memorandum, the bill alleges that afterwards; that is, after the giving of the memorandum, the respondent, for the further security of the appellants, and to induce them to make permanent improvements, agreed that in case of the

sale of the land under such agreement, referring to the memorandum, the price should be the actual value at the time of the agreement, superadding interest up to the time of the conveyance; and in case of a lease, the same should be durable; or, in other words, a lease in fee at the usual and customary rents of the country.

This agreement, or any other than what is contained in the memorandum, the respondent denied in his answer in chancery. A recurrence to the evidence becomes necessary then to see how far it will support the alleged agreement. The memorandum authorizing the appellants to take possession is dated in the year 1797; but it appears they had been in possession from the spring of 1794, under an assignment of a similar memorandum, which had been given by the respondent to Benjamin Lawrence. This assignment was known to the respondent in the fall of the year 1794, and he recognized the appellants as standing in the place of Lawrence. The memorandum given in 1797 was a mere substitute for the other, and must have a retrospective effect so as to sanction and make valid everything done by the appellants after they came into possession under the assignment from Lawrence. About this time, it appears that the appellants became uneasy with respect to their situation, and by their agent applied to the respondent to give them more satisfactory or better security. To this, according to the testimony of Lawrence, the respondent replied, that he would give them a good title as soon as he could obtain a release from Mr. Clarke's heirs; either by a durable lease on good terms, or a sale of the lot to them, as they chose. The agent preferred a lease, but still urged the respondent that the appellants hesitated about erecting a barn and other buildings, on account of the security for the land not being satisfactory. The respondent replied, that they might go on, build and occupy the lot, as if it were their own, and no advantage should be taken of their labor; that they should have the lot as wild land was going in the country at the time he should be able to give a title. This witness further proves, that in the year 1797, when what he calls the former permit to Lawrence was surrendered up, and one given to the appellants themselves, the respondent again renewed his engagement to sell or lease the land to the appellants, upon the terms before mentioned; and told them they might go on and erect buildings and make valuable improvements as if the land was their own. The same thing, substantially, was reiterated, over and over again, to divers wit-

nesses, and at various times, down to a period as late as the year 1803. The appellants were continually expressing their fears and apprehensions about making improvements on account of the insecurity of their title, and these fears and apprehensions were allayed by assurances that a title would be given as soon as partition could be made with Clark's heirs. The respondent at all times declared that the want of this was the only impediment to his giving a deed or lease; and he uniformly directs the appellants to go on, make improvements, use and occupy the land as their own, and that no advantage should be taken of them. The appellants, confiding in these assurances, have continued to make improvements, and expend their money to an extent which to them is a pretty serious amount. Can it be possible that all this, after such a lapse of time, furnishes no evidence of an agreement, either to sell or lease the land to the appellants? To my mind, it affords the most conclusive and satisfactory evidence of such agreement. The use that is now attempted to be made of the short lease of 1803, to rebut the inference to be drawn from this testimony, opens a door to many animadversions, that would not, to say the least of them, be very favorable to the respondent. I shall dismiss it, however, with barely advertng to the testimony of Simeon Parkhurst, who swears that before this lease was taken, assurances were made, both by the respondent and his agent, that such lease should not in any degree injure the appellants, or affect their contract, but that they should have a lease or deed, according to the former promise. After such assurances, this lease must be entirely put out of view.

Such being the leading facts, with respect to the agreement, and the circumstances under which the appellants have continued to occupy the lands from the year 1794, and the encouragement held out to them, from time to time, to make improvements; let us apply the law to this case and see the light in which such cases have been viewed by courts of equity.

I do not think it necessary to take up the time of the court in traveling through the numerous reported cases on the subject. The substance of them, so far as is necessary to be noticed on the present occasion, is summed up by Mr. Roberts, in his valuable Treatise on Frauds. "The relief," says he, p. 131, "against the statute, in these cases of part performance, was originally founded on the fraud and deceit usually characterizing the circumstances. There is no satisfactory foundation for the doctrine of part performance without the intermix-

ture of fraud; (p. 132) and upon this ground, where an owner of land has encouraged another to go on with his improvements upon the estate, under a false expectation of a conveyance, or a lease, and this expectation raised in him by the assurances of such owner, it is agreeable to the general course of equitable relief to disappoint the contrivance by compelling the deceiver to realize the expectation he has created;" that is by compelling him to give such deed or lease. "This protecting jurisdiction," he says, "has stretched itself to those cases where the illusory hope has been raised, not only by words and assurances, but simply by looking on in silence, whilst false impressions, which we are able either to correct or verify, are inducing a fruitless expenditure on improvements. This equity is strong and salutary, and the jealousy of jurisdiction has shut out the statute of frauds where this principle of relief applies." Again he says, p. 134: "These instances of encouragement, either tacit or express, to make improvements, incur expense, etc., are not proper cases of part performance, but of actual fraud, which courts of equity have always been forward to relieve against." "And the court will supply an agreement out of fraudulent suppressions, as well as misrepresentations of the party deceiving, who is considered as virtually agreeing to make good the expectation he has raised."

These are rules and principles flowing from the soundest morality, and sanctioned by the most weighty considerations of justice and equity, and are directly in point to the case before us. The testimony is strong and irresistible to show that the respondent, from time to time, encouraged the appellants to go on and make improvements, not only under an expectation, but reiterated promises, that when he had made a division with, or obtained a release, from the heirs of Clark, he would give them a deed, or durable lease.

The decree in the court of chancery admits that the appellants are entitled to relief, but that compensation for their improvements would be more fit and proper than a specific performance. Lord Redesdale, who thinks (2 Sch. & Lef. 552), courts of equity have gone far enough, if not too far, in decreeing specific performance of agreements, says, the original foundation of such decree was, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement was specifically performed. And on this ground, he says, the court of chancery, in a variety of cases, has re-

fused to interfere, where, from the nature of the case, the damages must, necessarily, be commensurate to the injury sustained; but the cases *Davis v. Thorne*, 1 Sch. & Lef. 347, in which the court decrees specific performance of contracts, are generally those where damages would not answer the intention of the parties in making the contract, and a specific performance is, therefore, essential to justice. Is not the case before us one of that description? Would it be as beneficial to the appellants to be paid for their improvements, as to have a specific performance? Would compensation answer the intention of the parties in making the contract? Would they have gone into the wilderness and spent the prime of their lives in clearing up a farm, and providing themselves with comfortable dwellings, under an expectation of being dispossessed on barely receiving a compensation for their improvements? The earnest solicitude expressed by them, on a variety of occasions, with respect to further security of their title, and the repeated applications to the respondents for this purpose, show, beyond the possibility of a doubt, that their intention was to procure for themselves a permanent settlement. Such cannot be a case for compensation. A specific performance is, in the language of Lord Redesdale, essential to justice. Who is to reap the benefit of the appreciation of the lands, they who have encountered the hardships and privations of a new country, and whose labor must, in a great measure, have produced this appreciation, or he who has kept them under the delusive expectation of a title until the farm is subdued, and now seeks to deprive them of it? The answer is obvious.

No reasonable objection can be made to a specific execution, on account of any uncertainty in the agreement. The proof makes out a parol contract with all requisite certainty, to wit, either to sell the land as wild land was selling in that part of the country in the year 1797, together with the interest, or to give a durable lease in fee, at the customary rent at that time, at the election of the appellants. In the case of *Shannon v. Bradstreet*, 1 Sch. & Lef. 73, Lord Redesdale, in answer to an objection as to the uncertainty of rent to be reserved pursuant to an agreement, said he did not think it uncertain, for it was capable of being reduced to certainty. Every executory contract must contain this species of uncertainty; but if it contains all that leads to future certainty it is sufficient. If this rule be sound, the price or rent of the land can be easily ascertained by a reference to a master. I am accordingly of opinion that

this is a fit and proper case for a specific performance, and that the decree of the court of chancery ought to be reversed.

SPENCER, J., concurred.

YATES and PLATT, JJ., absent.

VAN NESS, J., was of opinion that the decree of the court of chancery ought to be affirmed.

BATES, BICKNELL, BLOOM, CLARK, CROSBY, DATTON, ELMENDORF, HAGAR, KEYES, LOOMIS, LIVINGSTON, ROSS, STRANAHAN, SWIFT and VER BRYCK, senators, concurred in the opinion delivered by the chief justice.

VAN VECHTEN, Senator. The appellants have filed their bill in the court of chancery to obtain a specific performance of an agreement for the title to land in the Oriskany patent, which belongs to the respondent. The respondent, by his answer, denies the agreement, and insists upon the statute of frauds against any parol agreement which might be proved. From the bill, as well as the testimony in the cause, it appears that the appellants rely partly on an agreement by parol and partly in writing. [The senator then reviewed the evidence.] I shall consider the case as it stands: 1. Upon the written instrument; and, 2. Upon the parol evidence.

1 What does the written instrument import? Does it amount to a final bargain for the land in question upon any specific terms of which this court can decree the performance? According to my understanding of its plain language, it is a mere permission for the appellants to occupy the land, with a promise to give them the first offer to purchase or take a lease of it, when the respondent's title in severalty should be perfected; but it does not profess to fix either the terms of sale or of the lease. Can this court execute such an instrument specifically, by decreeing either a conveyance in fee or a lease? I presume not. A decree for a specific performance must operate upon and according to the terms of the agreement; and therefore if the instrument contains no specific terms, it is not susceptible of specific execution. The office of enforcing performance can not be exercised when the matters to be performed are left unsettled and uncertain by the parties to an agreement.

Suppose the court decrees a conveyance, what price, according to the instrument, are the appellants to pay? From what time are the payments to commence? Are they to be with or without interest? Or is the consideration to be paid at the de-

livery of the deed; and in that case what is the respondent to receive for the use and occupation of the land since 1794, when the appellants took possession? Or is he to receive no remuneration for upwards of twenty years' enjoyment of his land, and to be compelled to part with the title at the present appraised value thereof, considering it as in a wild state? Have the parties agreed by the instrument before us, to this mode of fixing the price, and by whom it is to be done? The instrument is totally silent upon all these points. Let me ask, then, what are to be the terms of a decree for a deed, according to the stipulations of the parties, as expressed in their written agreement.

Again, should the court decree a lease, for what term is it to be? What is to be the annual rent? How and when payable, and from what time is it to commence? What covenants and conditions are to be inserted in it; for the written instrument is silent as to all these particulars? Will a decree, bottomed upon this instrument, either for a conveyance in fee, or a lease upon such terms as the court shall direct, comport with the legal meaning of a specific execution of an agreement made and settled between the parties? In my opinion, it will be repugnant to all established principles: Roberts on Frauds, 135, 136, relative to specific performance; and that in order to make such a decree, the court must first assume the office of bargainors for the parties, to lay the foundation for it.

It can hardly be necessary for me to detain the court by citing authorities on this point. I shall, therefore, mention only a few of the numerous cases to be found in the books in support of my positions. In *Blagden v. Bradbear*, 12 Ves. jun. 466, the master of the rolls held, that to sustain a bill for specific performance of an agreement for the purchase of land, the agreement must express the price, or by reference to something else, must show what it was. In *Clinan v. Cooke*, 1 Sch. & Lef. 22, the lord chancellor held, that a bill for a specific performance of a written agreement for a lease for three lives, could not be sustained, because the agreement did not mention the term and did not refer to an advertisement of the defendant, offering to lease the land for three lives. So in *Clarke v. Wright*, 1 Atk. 12, Lord Hardwicke declared the omission of the price in a letter acknowledging a contract for the sale of land to be fatal.

2. Is the parol evidence competent to explain and supply the defects of the written instrument? By the statute of frauds, all contracts concerning the title to lands, which are not reduced to writing and signed by the parties, are declared to be invalid.

The wise provisions of this statute would be wholly defeated if parol evidence was admissible to enlarge and support a defective written agreement. But I need not dwell upon this point here. This court has recently decided in the case of *Mann v. Mann* [*ante*, 416], even of a will, a patent ambiguity renders it void, and that parol evidence to explain the intent of the testator, cannot be let in to establish it. If the law is so in relation to wills, which are entitled to the greatest benignity, the reasons upon which it is founded apply with greater force to a case like the present.

But admitting, for argument's sake, that the parol evidence is competent, what does it prove? According to my understanding, nothing more than that the respondent, in conversing about his Oriskany land, has repeatedly declared that it was his intention, when his title was completed, to sell or lease it, not only to the appellants, but to all the occupants thereof, as wild lands were going; and that he would take no advantage of their labor by enhancing his terms. I cannot collect from this evidence that he intended by such conversations to make a final bargain relative to the terms of sale, or the conditions of a lease, or to give any assurance with respect to those terms or conditions, except that he did not mean to avail himself of the occupant's labor. How, then, does the parol evidence ascertain the price to be paid for the land, or the terms of payment in case of a sale, or the terms and condition of the lease, if he should conclude to let it? Indeed, the appellant's principal witnesses, Lawrence and S. Parkhurst, differ essentially as to the price spoken of. The former says it was as wild land was going, when the respondent should be enabled to give a good title; the latter testifies that it was the price at which the land was going when he should give the title, or the price it was selling for at the time of the conversation in April, 1797, with the addition of interest from that time.

There is, however, another decisive objection to this evidence. The conversations to which it relates were prior to, or at the time when the written permission of 1793 to Lawrence was surrendered by S. Parkhurst, and he accepted the instrument of April, 1797, in lieu of it. The surrender was made, as Parkhurst deposes, to obtain a new contract. Why? Can any other reason be imagined, except that he wanted a fuller and more satisfactory engagement from the respondent? Did he receive such a one? No. Why? Because the respondent declined to give it. Was there any deception used to impose the instru-

ment of 1797 upon S. Parkhurst? He does not allege that there was. Does he pretend that he did not understand its import? No; for he had, in the fall of 1794, informed the respondents that the appellants wished for better security than the instrument of 1793, which was of the same tenor. What, then, is the fair inference from this transaction? Is it not that the instrument of 1797 was the fullest which the respondent would give, and that the appellant's agent accepted it understandingly. I, therefore, consider all the previous parol conversations, testified to by the appellant's witnesses, as merged in this instrument. And if they are, it results conclusively that the parol evidence cannot aid the appellants.

If I understood the appellant's counsel correctly, he disclaimed to rely upon part performance as ground for their relief in this case. It cannot, therefore, be necessary to consider that point; but if it was, the objection of total uncertainty in the alleged agreement would be decisive against the appellants. For though part performance will, in certain cases, induce a court of equity to enforce a parol agreement for the purchase of land, it cannot make an agreement susceptible of specific execution, when its terms are not specifically ascertained nor ascertainable.

But it was strongly urged in argument, that the appellants are entitled to relief on the ground of fraud, because they were led on by the false verbal assurances of the respondent to make valuable permanent improvements on the land. In order to try the strength of this position, it must be examined with reference to the appellants' bill, and the facts in the case. The scope and prayer of the bill are for the specific performance of an agreement. It sets forth the instrument of 1797, as the written contract relied on, and refers all the respondent's verbal assurances to it; but does not contain a single allegation of fraud other than what is implied by the charge of the respondent's refusal to fulfill his contract. What, then, is the question of fraud arising upon the appellants' bill? None other than that the law can imply in every case of a bill for specific performance. I have already shown that in such cases the decision must turn upon the validity and sufficiency of the agreement set forth and proved. But I will here add, that to entitle a party to relief upon the ground of fraud, the fraud must be specifically and expressly charged and put in issue. This point has been determined by this court in *McKernon v. James*, 6 Johns. 560, 561, 564, 565, in which the present chancellor and

Mr. Justice Spencer delivered the opinion of the court. The same rule is laid down in the English books: *Mittf. Pl.* 19, 255; *Gilb. For. Rom.* 218; *Clarke v. Turton*, 11 *Ves. jun.* 240; *Johnson v. Child*, 1 *Bro. C. C.* 94.

Again, should this be considered a case of fraud, it may be asked: What relief are the appellants to have? Will this court decree the land to them without price! Would not such a decree go beyond their claim, and travel out of the case presented by their bill? Or will the court undertake to establish the price and the terms of payment, or the terms and conditions of a lease to be given by the respondent? If it will, it must do so arbitrarily and without guide, or it must recur to the agreement set up by the appellants. The first would violate all the settled principles of justice and equity, and the latter brings us back to the question whether the agreement stated by the appellants has been duly proved, and can be specifically executed here.

I am aware that there are cases in the books in which it is laid down that a party's right shall be concluded by his fraudulent acts. But those are cases widely different from the present. For the purpose of illustration I will mention a few of them, and state the principles on which they are decided. Where a man who has a title to land, and knows of it, stands by and either encourages, or does not forbid the purchase from another, he, and all claiming under him, shall be bound by such purchase: 1 *Fonb. Eq.* 161; *Roberts on Fraud*, 130. For he imposed a false apprehension upon the purchaser by his silence when silence was treacherously expressive. So, where A. encourages a person to take a long lease from a tenant for life, to whom A. stands next in remainder, and to build and make improvements, and the tenant for life dies before the lease is out, a court of equity will not suffer A. to disturb the lessee until the expiration of his lease: *Hanning v. Ferrers*, *Eq. Ca. Abr.* 375. Because, to use the language adopted by his honor, C. J. Thompson, in *Nevin v. Belknap*, 2 *Johns.* 589, where a man has been silent, when in conscience he ought to have spoken, equity will debar him from speaking when conscience requires him to be silent.

Again, in the same case, when speaking of a purchaser taking possession and making improvements, under the circumstances above mentioned, his honor says that to make these acts available to him, they must be done as owner of the estate, and which he would not have done had he not considered himself in that light. Hence it will be seen that the class of cases in

which fraud will divest or suspend a man's title, differ totally from the case now before us. Here the appellants avow that they entered and made their improvements upon the faith of an agreement by which they acknowledge the title to the land to be in the respondents. There has, therefore, been no fraudulent concealment in the case. The appellants have not been treacherously led to purchase the title from another, nor to enter upon and improve the land, considering it as their own; for their bill furnishes conclusive evidence to the contrary.

But, after all, what evidence have we to support any allegation of fraud against the respondent? It is said that he induced the appellants to expend their labor and money to improve his land by false assurances that he would give them a good title for it. Is this true? To answer the question correctly, we must again look at the testimony. In July, 1793, the appellants obtained an assignment of a written permission given by the respondent to Lawrence to enter upon and hold the land until further orders; they to have the preference either to purchase or lease whenever his title should be perfected. By virtue of that assignment they took possession in the spring of 1794, and occupied the land until April 1797, when they surrendered the written license of 1793, and by their agent, S. Parkhurst, requested what he calls a new contract. Upon this request, the respondent gave them another written permission, dated the seventh of April, 1797, to possess the land, and containing a promise that as soon as his title should be completed by a release from the heirs of Mr. Clark, he would give them the preference either to purchase or take a lease. Before and at the time of giving the last permission, the respondent in several conversations relative to the terms upon which he intended to sell or lease the land, declared that he would sell or lease it to the occupants as wild land was going at the time of giving the title, and that no advantage should be taken of their labor.

But, although the appellants had, by their agent, S. Parkhurst, previous to that time, intimated to him their desire to have better security, he gave, and they accepted, the permission of 1797, as their only written security. This, in my opinion, puts the allegations of fraud, founded on the above conversations, at rest. For according to S. Parkhurst's testimony, the last permission must be considered as the new contract. Its language is plain, and cannot be misunderstood. If the appellants were not satisfied with it, they had an election to reject

it; but they elected to accept, and, therefore, are concluded by it. But the evidence does not stop here. In February, 1803, the respondent wrote a letter to his attorney, Mr. Platt, requesting him to give leases for three years to the settlers on his Oriskany lands; and in that letter he inclosed a list of the settlers, to whom he says he gave permission, several years before, to hold during his pleasure, without any other consideration than their taking care of and preventing waste on the land. The bill admits that a copy of this letter was delivered to one of the appellants, when he received the lease for three years. Surely, that copy gave the appellants full notice of the light in which the respondent considered his engagement to them, and after this notice they accepted from him, and held under a three years' lease, with covenants to deliver up the possession at its expiration.

Again, when the lease expired in the spring of 1806, G. W. F. Parkhurst, for himself and the other appellants, addressed a letter to the respondent, which unequivocally admits that he has the absolute disposal of the land, and explicitly negatives every pretense of any agreement with them, either for a deed or lease upon any terms. What then is the evidence of fraud and deception in this case? It is obvious that the appellants were ignorant of any in 1806, and the case furnishes no testimony of a discovery since.

In every point of view in which I have considered this case, I am fully satisfied that the appeal cannot be sustained. I am, therefore, constrained, notwithstanding it may appear hard against the appellants, to concur in the decree made by his honor the chancellor. For to use the strong language of Mr. J. Thompson, in the case of *Jackson v. Sill*, 11 Johns. 220 [6 Am. Dec. 363], "it is better to preserve consistency in legal principles, although it may not always suit the equity of the individual case, than to make those principles bend to what may be thought the substantial justice of each particular case."

ALLEN, BARKER, COCHRAN, FREY, HASCAL, RADOLIFF, SEYMOUR, STEWART, TIBBETS and WENDELL, Senators, were of the same opinion.

A majority of the court being of opinion that the decree of the court of chancery ought to be reversed, it was thereupon "ordered, adjudged and decreed, that the decree appealed from be reversed, etc., and that the proceedings in this cause be remitted to the court of chancery to the end that the decree

made therein, in the said court, prior to the rehearing thereof, and to the making the decree hereby reversed, may be carried into full effect; and that the respondent pay to the appellants their costs of this appeal, to be taxed and allowed by the said court of chancery."

Decree reversed.

In *Glass v. Hulbert*, 102 Mass. 35, Wells, J., says: "The fraud most commonly treated as taking an agreement out of the statute of frauds, is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the party is held by force of his acts or silent acquiescence which have misled the other to his harm, to be estopped from setting up the statute of frauds: *Hawkins v. Holmes*, 1 P. Wms. 70; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274; S. C., 14 Johns. 15; *Browne on St. of Frauds*, sec. 437, *et seq.*; *Fry on Sp. Perf.*, secs. 384-88; *Caton v. Caton*, Law Rep., 1 Ch. 137, 147; S. C. Law Rep., 2 H. L. 127." As to the distinction taken upon the admissibility of evidence between a plaintiff seeking and a defendant resisting a specific performance, see the elaborate notes to *Wooliam v. Hearn*, 2 White and Tudor's L. Cas. in Eq. 484, where the principal case is frequently referred to.

ANDERSON v. DRAKE.

[14 JOHNSON, 114.]

DEMAND, WHERE MADE.—Where a note is not payable at any particular place, and the maker has a known and permanent residence within the state, the holder must make a demand of payment there, in order to charge the indorser.

PLACE OF DATE OF NOTE.—Dating a note at a particular place does not of itself make that the place of demand, with respect to charging an indorser.

REMOVAL OF MAKER.—The removal of the maker before maturity of the note from the place where the note was dated to a place within the state, where he afterwards resided, will not excuse presentment at the latter place, in order to charge the indorser.

ASSUMPT against the indorser of a promissory note. The cause came before this court upon a demurrer to the defendant's plea. The case is stated in the opinion.

J. Strong, in support of the demurrer.

Anthon and Slosson, *contra*.

By Court, THOMPSON, C. J. This case comes before the court on a demurrer to the second plea. The defendant being sued as an indorser of a promissory note, pleads specially that the maker of the note had, shortly after the making thereof, and before it became payable, removed from the city of New York to Kingston, in Ulster county, there permanently to reside, which was well known to the plaintiff; and that no demand had been made upon the maker. The demurrer admits the truth of these allegations. And the question presented is, whether a demand upon the maker at Kingston was necessary in order to charge the indorser. It does not appear from the declaration, that the note was made payable at any particular place; nor is there any allegation from which we are to infer that the note, upon the face of it, appears to have been made in New York. The case, however, was argued by the defendant's counsel upon the admission of that fact, and our opinion is founded on the supposition that the note appears, on the face of it, to have been drawn in New York, that being at the time the place of residence of the drawer, though before the note fell due he removed to Kingston in Ulster county, there permanently to reside.

Whether under such a state of facts, a demand on the maker at Kingston was necessary, or whether it was sufficient if made in New York, where the note was drawn, is the point to be decided. Had the note expressly been made payable in New York, a demand there would have been sufficient, notwithstanding the removal of the drawer. *LIVINGSTON, J.*, in delivering the opinion of the court in *Stewart v. Eden*, 2 Cai. 127 [2 Am. Dec. 222], says, the note being dated in New York, the maker and indorser are presumed to have contemplated payment there. This, however, was not the point directly before the court; and it is evident from a subsequent part of the opinion, that he did not intend to be understood that New York would have been the place to demand payment of the maker, or to give notice to the indorser in case of a permanent removal from the city. In *Thompson v. Ketcham*, 8 Johns. 190 [5 Am. Dec. 332], the note was dated at Montego Bay, yet it was not deemed payable there; otherwise parol evidence would have been inadmissible to prove it was payable at New York. Such evidence would have been repugnant to the written note, if the inference of law was, that it was payable at Montego Bay. This point was in some measure before the supreme court of Pennsylvania, in *Fisher v. Evans*, 5 Binn. 542. It was there contended in argument that the place where the bill was drawn and dated

must be taken to be the residence of the drawer, and that the holder was not bound to look for him elsewhere. But the chief justice said he knew of no such principle and that the proper place to give notice to the person entitled to receive it, was at his permanent residence.

Bayley, in his Treatise on Bills, 58, states the rule to be, that if the drawer or maker cannot be found at the place where the bill or note is payable, and it appears that he never lived there or has absconded, the bill or note is to be considered as dishonored; but if he has only removed, the holder must endeavor to find out to what place he has removed, and make the presentment there. This is, in some measure, supported by the case of *Collins v. Butler*, Str. 1087. This rule, I apprehend, cannot be correct to the extent there laid down. The settled law now is, that a demand of payment at the place where the note is made payable is enough to charge the indorser. This is so decided in the case of *Saunderson v. Judge*, 2 H. Bl. 509, and by this court in the case of *Stewart v. Eden*; but according to Mr. Bayley, the holder must follow the maker to the place of his removal.

The general rule is, that the holder of a note is bound to make use of all reasonable and proper diligence to find the maker, and demand payment, where no particular place is appointed for such payment. And in determining what shall be considered reasonable diligence, due regard must be had to the security of indorsers as well as to the unembarrassed circulation of negotiable paper. The laying down precise rules, however, on this subject, is attended with some difficulty. In a case decided in this court, but which is not reported, the drawer of the note had removed to Canada; the note was drawn and dated at Albany, though not made payable at any particular place, and it was held that a demand in Albany was sufficient to charge the indorser. I can find no distinction in the books as to the place being within the jurisdiction of the court, which varies the rule on this subject; nor do I see any substantial reason for any such distinction. It is necessary, however, that some rule should be settled, and I am inclined to think where a note is not made payable at any particular place, and the maker has a known and permanent residence within the state, the holder is bound to make a demand at such residence, in order to charge the indorser. Whoever takes such note is presumed to have made inquiry for the residence of the maker, in order to know where to demand payment, and to assume upon himself all the incon-

venience of making such demand, and the risk of the maker's removing to any other place before the note falls due. As the demurrer, therefore, in this case, admits the permanent residence of the maker to have been at Kingston when the note fell due, and that known to the plaintiff, he was bound to demand payment of the note at that place; and not having done so, the indorser is discharged. The defendant must accordingly have judgment upon the demurrer.

Judgment for the defendant.

Davies, J., in *Foster v. Julien*, 26 N. Y. 31, says: "In this state, the rule has been regarded as well settled since the decision of the case of *Anderson v. Drake*, that a removal of the maker out of the state after the making of the note, and before its maturity, excuses the holder from presentment and demand." This case is also relied upon in *Taylor v. Snyder*, 3 Denio, 148; *Central B. v. Allen*, 16 Mo. 44; *Wheeler v. Field*, 6 Met. 295; *Barry v. Morse*, 3 N. H. 123; *Dennis v. Walker*, 7 Id. 200; *Caldwell v. Porter*, 17 Id. 32.

GARDNER v. THOMAS.

[14 JOHNSON, 124.]

TORTS ON HIGH SEAS.—Actions for personal injuries are of a transitory nature, and follows the person or *forum* of the defendant. Consequently, courts of this state have jurisdiction of actions brought for torts committed on board of a foreign vessel on the high seas, where both parties are foreigners; but it rests in the sound discretion of the court to exercise jurisdiction or not, according to the circumstances of the case.

ERROR to the justice's court. Thomas brought his action for an assault and battery committed on the high seas by Gardner, and recovered judgment. This writ was then taken by the defendant. The case appears from the opinion.

Caines, for the plaintiff in error.

Antho'n, *contra*.

By Court, YATES, J. This cause comes up on a *certiorari* to the justices' court in New York. The action was for an assault and battery. The defendant pleaded that the assault and battery, if any, was committed on board of a British vessel upon the high seas, and that the plaintiff and defendant were both British subjects, one the master, and the other a sailor on board the same vessel. To this plea there was a demurrer and joinder, on which judgment was given for the plaintiff below.

The question presented by this case is, whether this court will take cognizance of a tort committed on the high seas, on board

of a foreign vessel, both the parties being subjects or citizens of the country to which the vessel belongs. It must be conceded that the law of nations gives complete and entire jurisdiction to the courts of the country to which the vessel belongs, but not exclusively. It is exclusive only as it respects the public injury, but concurrent with the tribunals of other nations, as to the private remedy. There may be cases, however, where the refusal to take cognizance of causes for such torts may be justified by the manifest public inconvenience and injury which it would create to the community of both nations; and the present is such a case.

In *Moysten v. Fabrigas*, Cowp. 176, Lord Mansfield, in his opinion there stated, is sufficiently explicit as to the doctrine, that for an injury committed on the high seas, circumstanced like the one now before us, an action may be sustained in the court of king's bench; he only appears to doubt whether an action may be maintained in England for an injury in consequence of two persons fighting in France, when both are within the jurisdiction of the court. The present action, however, is for an injury on the high seas, and, of course, without the actual or exclusive territory of any nation. The objection to the jurisdiction, because it must be laid in the declaration to be against the peace of the people, is not sufficient, for that is mere matter of form, and not traversable. In *Rafael v. Verclst*, 2 W. Bl. 1058, DeGrey, C. J., says, that personal injuries are of a transitory nature, *et sequuntur forum rei*; and, though in all declarations, it is laid *contra pacem*, yet that is only matter of form, and not traversable.

It is evident, then, that our courts may take cognizance of torts committed on the high seas, on board of a foreign vessel, where both parties are foreigners; but I am inclined to think it must, on principles of policy, often rest in the sound discretion of the court to afford jurisdiction or not, according to the circumstances of the case. To say that it can be claimed in all cases, as matter of right, would introduce a principle which might oftentimes be attended with manifest disadvantage and serious injury to our own citizens abroad, as well as to foreigners here. Mariners might so annoy the master of a vessel as to break up the voyage, and thus produce great distress and ruin to the owners. The facts in this case sufficiently show the impropriety of extending jurisdiction; because, it is a suit brought by one of the mariners against the master, both foreigners, for a personal injury sustained on board of a foreign

vessel, on the high seas, and lying in port where the action was commenced, and for aught that appears in the case, intending to return to their own country without delay, other than what the nature of the voyage required. Under such circumstances, it is manifest that correct policy ought to have induced the court below to have refused jurisdiction, so as to prevent the serious consequences which must result from the introduction of a system, with regard to foreign mariners and vessels, destructive to commerce, since it must materially affect the necessary intercourse between nations, by which alone it can be maintained. The plaintiff, therefore, ought to have been left to seek redress in the courts of his own country, on his return. The judgment, for these reasons, may be deemed to be improvidently rendered in the court below, and is, therefore, reversed.

Judgment of reversal.

BRACKET v. McNAIR.

[14 JOHNSON, 170.]

MEASURE OF DAMAGES.—In an action for the breach of a contract to transport goods to a certain place, the measure of damages is the difference between the value of the goods at the place from which they were to be transported, and the value of the same at the place to which they were to have been carried.

ASSUMPSIT. The plaintiff declared upon a written agreement entered into by the parties to this action, whereby McNair agreed to transport a certain quantity of salt, the property of Bracket, from Oswego to Queenston, for a stated price per barrel for transporting; the transportation to be made by McNair's vessels, half on the first trip to Queenston after making the contract, and the remainder on the next trip. Plaintiff proved that vessels belonging to defendant had sailed to Queenston, after the contract was entered into, and before information of the non-intercourse law was received, and that none of plaintiff's salt had been transported. Judgment was given for the plaintiff for the difference in value of the salt at Oswego, and the value of the same at Queenston. The case came before this court on a motion for a new trial, and was submitted without argument.

By Court. The testimony in this case shows, that several vessels, under the charge of the defendant sailed from Oswego

after the contract was entered into with the plaintiff, and before any information was received at that place of the non-intercourse law between the United States and Great Britain, and no reason whatever is assigned, why the plaintiff's salt was not transported. The evidence does not show, in any manner, a performance of a contract by the defendant, or any excuse for the non-performance. The case is very imperfectly drawn, or must have been very obscurely explained upon the trial. Whether the testimony of Richmond and of Hugarin, as to the transportation and delivery of salt of the plaintiff's to Thomas Clark, of Queenston, and to Porter, Barton & Co., of Lewiston, has any relation to the four hundred barrels mentioned in the special agreement, is entirely unexplained. The defendant, according to the facts stated in the case, has failed to perform his contract in the transportation of the salt, and if so the rule of damages adopted by the judge was no more than giving to the plaintiff an indemnity for the injury sustained by the breach of contract by the defendant. He has recovered no more than the difference between the value of his salt at Oswego, from whence it was to be taken, and at Queenston, the place to which it was to be carried. Whether the evidence of the handwriting to the receipts offered in evidence, was properly rejected, is unimportant, these receipts do not appear to have any connection with this transaction, from any thing disclosed in this case. The motion for a new trial must accordingly be denied.

Motion denied.

This case is included by Mr. Sedgwick in his *Leading Cases on the Measure of Damages*, p. 99. In *O'Connor v. Forster*, 10 Watts, 418, Sergeant, J., delivering the opinion of the court, considers the rule here adopted as "fair and reasonable, and the only one by which justice can be done between the parties." See the principal case followed in *Ward v. N. Y. Cent. R. R. Co.*, 47 N. Y. 33.

CLUTE v. WIGGINS.

[14 JOHNSON, 175.]

INNKEEPER'S LIABILITY.—An innkeeper is liable for the goods of his guests stolen from the inn. So, where a sleigh, loaded with grain, was put into an out-house appurtenant to the inn, "where it had been usual for the defendant to receive loads of that description," and the door was broken open during the night, and the grain was stolen, the innkeeper was held responsible for the loss without proof of negligence.

ERROR to a justice's court. Wiggins, a wagoner, brought an action on the case against Clute, a tavern-keeper, to recover the value of several bags of wheat and barley, stolen from the sleigh of the plaintiff during the night, while he was entertained as a guest in defendant's house. It appeared on the trial that the plaintiff came to the defendant's tavern with a load of wheat and barley, and was received as a guest for the night; that his horses were put into the plaintiff's stable, and his sleigh, with the wheat and barley, "was put into the wagon-house of the plaintiff, where it had been usual for the defendant to receive loads of that description." The next morning it was discovered that the door of the wagon-house had been broken open and all the wheat and barley stolen from the plaintiff's sleigh. Judgment for the plaintiff below.

Weston, for the plaintiff in error, cited 3 Bac. Ab., tit. Inns and Innkeepers, c. 5; 1 Com. Dig. 229.

Skinner, contra.

By Court. The liability of an innkeeper for such losses, arises from the nature of his employment. He has privileges by special license. He holds out a general invitation to all travelers to come to his house, and he receives a reward for his hospitality. The law in return imposes on him corresponding duties, one of which is to protect the property of those whom he receives as guests. On general principles applicable to this subject, the defendant is liable for the loss sustained in this case. He received the plaintiff as his guest for the night, with his loaded sleigh and horses. The sleigh, with its contents, was put into an out-house, appurtenant to the inn, "where it had been usual for the defendant to receive loads of that description." The doors of this wagon-house were broken open, from which it may be inferred that the building was close, and the doors fastened in such a manner as to promise security. The bags of grain, therefore, may be deemed to have been *infra hospitium*; and being so, it is not necessary to prove negligence in the innkeeper to make him liable for the loss: *Cayle's Case*, 8 Co. 32; *Bennet v. Miller*, 5 T. R. 273.

Judgment affirmed.

This case is one of our early cases laying down the liability of an innkeeper according to the doctrine of the common law, and in almost all our subsequent cases on this subject it will be found cited as authority.

WHO ARE INNKEEPERS.—An innkeeper at common law, has been said to be the keeper of a common inn for the lodging and entertainment of travelers

and passengers, their horses and attendants, for a reasonable compensation: 5 Bac. Abr. Inns C.; Story on Bailments, sec. 475. An inn is stated to be "a house, the owner of which holds out that he will receive all travelers and sojourners, who are willing to pay a price adequate to the sort of accommodations provided, and who come in a situation in which they are fit to be received." Best, J., in *Thompson v. Lacy*, 3 B. & Ald. 287. The language of Rhodes, J., in a leading case on this subject, *Pinkerton v. Woodward*, 33 Cal. 596, is instructive. He says: "The definition of an inn given by Mr. Justice Bayley in *Thompson v. Lacy*, 3 B. & Ald. 286, as 'a house where a traveler is furnished with everything which he has occasion for while on his way,' is comprehensive enough to include every description of an inn; but a house that does not fill the full measure of this definition may be an inn. It probably would not now be regarded as essential to an inn that wine or spiritous or malt liquors should be provided for the guests. At an inn of the greatest completeness, entertainment is furnished for the traveler's horse, as well as for the traveler; but it has long since been held that this was not essential to give character to the house as an inn." On this restricted use of an inn, Story on Contracts, sec. 904, says: "It may, however, be questioned whether an innkeeper is not authorized to restrict the use of his inn to certain classes of persons, as in the case of the *loges à pied* met with throughout France, and intended for foot travelers only, and if so, he should not be liable for refusing to receive and entertain persons traveling in carriages, and of a different class from those whom he professes to receive. This rule undoubtedly applies to carriers, and it has been thought it should be extended to innkeepers."

The definition that an inn is a public house of entertainment for all who choose to visit it is given in *Wintermute v. Clark*, 5 Sandf. 247, and is much commended. For other definitions, see *Walling v. Potter* 35 Conn. 183; *Kiston v. Hildebrand*, 9 B. Mon. 72, 75; *Dansey v. Richardson*, 1 El. & Bl. 168; *Mateer v. Brown*, 1 Cal. 227. A person who keeps a mere private boarding-house, or lodging-house, cannot be regarded in any proper sense, an innkeeper: Story on Bailments, sec. 475; nor the keeper of a coffee-house or restaurant: *Doe v. Laming*, 4 Camp. 77; *Carpenter v. Taylor*, 1 Hilt. 193. A person who does not hold himself out as an innkeeper, but entertains travelers occasionally for pay, is not an innkeeper, nor liable as such: *Lyon v. Smith*, 1 Morris, Iowa, 184. So a person keeping a lodging-house for strangers at a watering place during the summer, not open to all, is not an innkeeper: *Southwood v. Myers*, 6 Bush, 681. As to the distinction between a boarding-house and an inn, see *Williard v. Reinhard*, 2 E. D. Smith, 148; and a very interesting opinion of Daly, J., in *Cromwell v. Stephens*, 2 Daly, 15.

It is now held that there is no obligation upon a lodging-house keeper to take care of the goods of his lodgers; and accordingly, in the absence of negligence, he is not responsible for a theft of them by a stranger, who came in to view the rooms which were about to be vacated by the plaintiff, although the latter was then absent and the stranger was allowed to look at the rooms by the defendant himself: *Holder v. Souby*, 8 C. B. (N. S.) 254.

Where it is doubtful in what character a person holds himself out, whether as a lodging-house keeper or an innkeeper, the question may be properly left to the jury to determine; for his acts, in spite of his declarations, may fix upon him the character of an innkeeper: *Houth v. Franklin*, 20 Tex. 798. So it is not necessary that a party should put up a sign as keeper of an inn; it is sufficient, if in fact he keeps an inn: Bac. Abr. Inns, B.; *Dickerson v. Rodgers*, 4 Hump. 179.

In *Pullman Car Co. v. Smith*, 73 Ill. 360, the question was raised whether

the owners of sleeping cars on railroads should be liable as innkeepers; and it was there decided that they were not so liable.

WHO ARE GUESTS.—The cases show that to entitle one to the privileges and protection of a guest, he must have the character of a traveler; one who is a mere temporary lodger, in distinction from one who engages for a fixed period, at a certain agreed rate. The main distinction is the fact that one is a wayfarer or *transiens*; and it matters not how long he remains, provided he assumes this character: *Bennett v. Mellor*, 5 T. R. 273; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Hall v. Pike*, 100 Mass. 495; *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 557; *Jalie v. Cardinal*, 35 Wis. 118; *Lusk v. Belote*, 22 Minn. 468; *Manning v. Wells*, 9 Humph. 746; *Neil v. Wilcox*, 4 Jones L. 146. Regular boarders by the week are not guests: *Johnson v. Reynolds*, 3 Kan. 257; *Lawrence v. Howard*, 1 Utah, 142. Slight circumstances have been held to constitute a party coming to an inn a guest: *McDaniels v. Robinson*, 26 Vt. 316, 333; *Read v. Amidon*, 41 Id. 15. When a party has in fact become a guest, his temporary absence will not affect the innkeeper's liability for property left at the inn: *McDonald v. Edgerton*, 5 Barb. 560; 2 Croke, 189; *Grinnell v. Cook*, 3 Hill, 400; *Baker v. Day*, 2 Hur. & C. 14. So when he departs, leaving his baggage in the innkeeper's charge, the latter may be liable for it as such for a reasonable time afterwards: *Adams v. Clem*, 41 Ga. 524; S. C., 5 Am. Rep. 524. Whether a person be a guest or a lodger, in order to determine the liability of an innkeeper, was held a question for the jury, in *Jalie v. Cardinal*, *supra*. The duration of the person's stay, the price paid, the amount of accommodation afforded, the transient or permanent character of the party's residence or occupation, his knowledge of any difference of accommodation afforded to, or price paid by boarders and by guests, are all material facts determining whether the person be a guest: Story on Bailments, sec. 477, note.

If a traveler leave his horse at an inn, and lodge elsewhere, he will be considered a guest: *York v. Grindstone*, 1 Salk. 388; *Mason v. Thompson*, 9 Pick. 280. In the last case it was decided that a person who commits his horse to an innkeeper to be fed, is a guest, although not lodging or receiving any refreshment at the inn. This constructive character given to a person as a guest is not approved in *Grinnell v. Cook*, 3 Hill, 485, and in *Ingalls v. Wood*, 33 N. Y. 577; but in *McDaniels v. Robinson*, 26 Vt. 316, the subject is fully examined by Redfield, C. J., who ably reviews the English cases, and holds the same doctrine as laid down in *Mason v. Thompson*. It is held in *McDaniels v. Robinson*, that the relation of guest is created by a person's putting his horse at an inn; and it will be extended to all his goods left at the inn, and lodging there a portion of the time; and it is not necessary that the traveler should take all his meals at the inn, or lodge there every night, in order to create the relation, or constitute himself a guest. The doctrine here laid down is approved by Story on Bailments, sec. 477. The cases where one places property in the possession of an innkeeper, and thereby acquires the character of a guest, show that there was something more than the mere deposit of the property, that there was besides some entertainment given to the owner of the property, or some undertaking or liability to keep or entertain him. It is a hard rule to hold that the mere placing of property in the charge of an innkeeper by one not a *bona fide* traveler, and who does not assume to reside or take any accommodation at the inn, should be sufficient to entitle the owner of that property to the protection and immunity of a guest. In this case he should only be entitled to the rights of a

bailor for hire. In *Peet v. McGraw*, 25 Wond. 653, Nelson, C. J., says: "It is not necessary, in point of fact, that the owner or person putting the horses to be kept at a public inn should be a guest at the time, in order to charge the innkeeper for any loss that may happen, or to entitle him to the right of lien. This has been repeatedly held. * * * If the horses be left with the innkeeper, though the owner may put up at a different place, the former is answerable for the safe-keeping, and should, of course, be entitled to the summary remedy for his reasonable charges." But late cases in New York do not follow the doctrine conveyed in this language. The point adjudged in *Grinnell v. Cook*, 3 Hill. 485, is that if one who is not a traveler, wayfarer or transient person, but a resident of the place, keep his horses at an inn, the innkeeper is merely answerable for negligence, being regarded in this case merely as a livery man. The material question, then, is to determine whether the person be traveling or on a journey. If this fact appears, his entrusting his property to an innkeeper while *en route*, though he may not live or board in the inn, may be sufficient to fix upon the innkeeper a liability as such, so far as a responsibility for the property is concerned. Thus, in *Hickman v. Thomas*, 16 Ala. 666, an innkeeper furnished one, not a guest, but a mail contractor, with stables and provender for his horses for more than two years, during which time they were under the care of the servants of the innkeeper: It was held that he was not entitled to the rights of an innkeeper, so far as having a lien on the horses for a debt. The court, in this case, followed *Grinnell v. Cook*, *supra*.

EXTENT OF INNKEEPER'S LIABILITY.—The principles of the English and the American law in regard to the nature of the obligations assumed by innkeepers are traced from *Calve's case*, 8 Co. 32. This case contains an abstract or epitome of the law touching the liabilities of innkeepers, and is included in Smith's Leading Cases, where the syllabus thus reads: If the horse of a guest at an inn be stolen, the innkeeper is not liable if the horse were put to pasture at the guest's request; otherwise if the innkeeper had put the horse to grass of his own head. If the goods of a neighbor, who lodges at the inn as a friend, at the request of the innkeeper, be stolen, the innkeeper is not liable. If a neighbor who is no traveler, as a friend, at the request of the innkeeper, lodges there, and his goods be stolen, etc., he shall not have an action. An innkeeper is bound to answer for himself and for his family, for the chambers and stables; for they are *infra hospitium*. It is no excuse for the innkeeper that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open. Although the guest does not deliver his goods to the innkeeper to keep, yet, if they be carried away or stolen, the innkeeper is liable. If the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged. The innkeeper requires his guest to put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not; the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged. The innkeeper's liability extends to all movable goods, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, etc. 'If the guest be beaten in the inn, the innkeeper shall not answer for it.'

On the question of the liability of an innkeeper, there is much conflict of authority. Whether he is, like a common carrier, to be regarded as an insurer, and only excused by the act of God, or the public enemy, is a question which has been very much discussed. Sir William Jones (Bailments, 04), says: "It has long been holden that an innkeeper is bound to restitution,

if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged in his inn, or stolen out of it by any person whatever; nor shall he discharge himself from this responsibility by a refusal to take any care of the goods because there are suspected persons for whose conduct he cannot be answerable. It is otherwise, indeed, if he refuse admission to a traveler because he really has no room for him, and the traveler nevertheless insist upon entering, and place his baggage in a chamber without the keeper's consent. Add to this, that, if he fails to provide honest servants, and honest inmates, according to the confidence reposed in him by the public, his negligence in that respect is highly culpable, and he ought to answer civilly for their acts, even if they should rob the guests who sleep in his chambers. Rigorous as this law may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield; for travelers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them. Hence the prætor declared, according to Pomponius, his desire of securing the public from the dishonesty of such men, and by his edict gave an action against them, if the goods of travelers or passengers were lost or hurt by any means, except *damno fatali*, or by inevitable accident; and Ulpian intimates that even this severity could not restrain them from knavish practices or suspicious neglect. In all such cases, however, it is competent for the innkeeper to repel the presumption of his knavery or default, by proving that he took ordinary care, or that the force which occasioned the loss or damage was truly irresistible."

It therefore appears that one of our oldest authorities holds an innkeeper may excuse himself on the ground of *vis major*, and therefore his liability does not extend so far as that of a common carrier, who could not defend himself on this ground. This is the view of Story, *Bailments*, sec. 472; Kent, 2 Com. 593; Wharton on Neg., sec. 678; Addison on Torts, vol. 1, sec. 684. Other authorities hold the innkeeper to a stricter liability, and lay it down that he is an insurer as a common carrier, and can only be exempt from liability on the same grounds: 2 Parsons on Contr. 146; 2 Story on Contr., sec. 909; Chitty on Contr. (11 Am. ed.) 675; Saunders on Neg. 212. It is thus seen what conflict of authority there is on this point; that while robbery from without, and fire, are held to excuse the innkeeper by some authorities, they are not held sufficient to exempt him from his common law liability. Bennett, the learned editor of Story on Bailments, is inclined to qualify the statement of the law on this subject, by Story, holding the innkeeper excused by *vis major*, or fire. Parsons is very decided on this point, holding that the innkeeper, according to the prevailing authorities, is an insurer against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property. But he notices a disposition to modify this strict rule in later cases, especially in *Dawson v. Chamney*, 5 Q. B. 164; and *Merritt v. Claghorn*, 23 Vt. 177.

In New York fire has been held not to exempt the innkeeper from liability: *Hulett v. Swift*, 33 N. Y. 571; but after the decision in this case the law was modified by statute in 1866, which was passed with the view of mitigating the rigor of the rule declared in that case: *Faucett v. Nichols*, 64 N. Y. 377. The cases holding an innkeeper to the strict liability of an insurer, and only exempt by the act of God or the public enemy are: *Masteer v. Brown*, 1 Cal.

221; *Shaw v. Berry*, 31 Me. 478; *Norcross v. Norcross*, 53 Id. 163; *Burrows v. Trieber*, 21 Md. 320; *Mason v. Thompson*, 9 Pick. 280, 284; *Manning v. Wells*, 9 Hump. 746; *Thickett v. Howard*, 8 Black. 535; *Sasseen v. Clark*, 37 Ga. 242. While on the contrary are: *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Id. 302; *Houth v. Franklin*, 20 Tex. 798; *McDaniels v. Robinson*, 26 Vt. 316; *Read v. Amidon*, 41 Id. 15; *Kisten v. Hildebrand*, 9 B. Mon. '72; *Woodward v. Morse*, 18 La. An. 156; and a late case in Michigan: *Cutter v. Bonney*, 30 Mich. 259; S. C., 18 Am. Rep. 127.

In the last case it is held that an innkeeper is not liable to his guests for property destroyed without his negligence by accidental fire. Campbell, J., examines the law very fully. Referring to the New York rule, he says: "The doctrine imposing such a liability may be said to rest entirely on what was said by Justice Porter, in *Hulett v. Swift*, 33 N. Y. 571. In that case the subject is discussed at some length, and with much ability. But no foundation is shown there for the doctrine asserted, beyond remarks which are confessedly opposed to the text books, and which were foreign to what was actually decided in the cases where they are found. The whole opinion of the learned judge is open to the same criticism; as he himself declares the point discussed did not really arise, inasmuch as no proof was introduced changing the presumption raised by law against the defendant. The opinion was not unanimous, and the dissent of Judge Denio would detract much from its force, even if it had been pertinent to the facts. Opposed to this is the case of *Merritt v. Claghorn*, 23 Vt. 177, in which Judge Redfield, delivering the opinion of the court, reached the conclusion that where there was no negligence there was no responsibility for loss by fire. This opinion is an able one, and was not given beyond the facts. It has been both approved and criticised, but no occasion has heretofore arisen to consider its correctness upon similar facts: *Vance v. Throckmorton*, 5 Bush, 42, is to the same effect, but there too the decision might have rested on other grounds, and its authority is therefore diminished. We regard the decision in Vermont as reasonable, and as within the fair meaning of the common law."

The liability of an innkeeper for money, etc., is not limited to what is reasonably necessary for traveling: *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Wilkins v. Earle*, 44 N. Y. 172; S. C., 4 Am. Rep. 655; *Pinkerton v. Woodward*, 33 Cal. 557; *Snider v. Geiss*, 1 Yeates, 34, where the innkeeper was held liable for two hundred and thirty Spanish milled dollars. But other cases hold him liable only for reasonably necessary articles: *Sasseen v. Clark*, 37 Ga. 242; *Simon v. Miller*, 7 La. An. 360; *Trieber v. Burrows*, 27 Md. 130; *Myers v. Cottrill*, 5 Biss. 465.

WHEN LIABILITY BEGINS AND ENDS.—The goods need not be placed in the special keeping of the innkeeper in order to make him liable. It is sufficient if the goods are within the inn, *infra hospitium*: *Bennett v. Mellor*, 5 T. R. 273; 2 Kent. Com. 593; *McDonald v. Edgerton*, 5 Barb. 560; *Packard v. Northcraft*, 2 Met. (Ky.) 439; *Norcross v. Norcross*, 53 Me. 163; *Burrows v. Trieber*, 21 Md. 320; and the principal case is in point. Where a hotel-keeper sends his porter to the cars to receive the baggage of persons traveling, and baggage is delivered to the porter and the traveler becomes the guest of the hotel, the liability of the innkeeper as such for the baggage begins on the delivery to the porter, and continues until a redelivery to the actual custody of the guest. And if the porter take charge of the baggage at the hotel to deliver it at the cars for the guest, the liability of the innkeeper continues until the baggage be delivered: *Sasseen v. Clark*, 37 Ga. 242. An innkeeper is liable for goods left with him by a guest for a reasonable time after the

guest has paid his bill, if he assents to their being left at the inn: *Adams v. Clem*, 41 Ga. 65; S. C., 5 Am. Rep. 524; *Giles v. Fauntleroy*, 13 Md. 126; or if the guest has not had a reasonable time to remove them: *Seymour v. Cook*, 53 Barb. 451. When a boarder is ordered to leave a hotel for not paying his board, and thereupon leaves without removing his baggage, the proprietors thereafter are reckoned as bailees thereof without reward, and are responsible for gross negligence only: *Lawrence v. Howard*, 1 Utah, 142. Wharton on Negligence, sec. 687, says: "It is an interesting question how long, when a guest leaves his baggage with an innkeeper, the innkeeper is liable, as innkeeper, for such. Judging from the analogy obtaining as to common carriers, we would conclude that the exceptional and onerous insurance liability of the innkeeper would not continue after the guest has permanently left the inn, allowing, of course, for a few hours which may be necessary for porters to effect a removal."

DEFENSES BY INNKEEPER.—Besides defending himself by reason of the act of God and of the public enemy, and as some good authorities hold, by inevitable accident, the innkeeper may set up contributory negligence, or the default of the guest: *Hawley v. Smith*, 25 Wend. 642; *Hadley v. Upshaw*, 27 Tex. 547; *Chamberlain v. Masterton*, 26 Ala. 371; *Kelsey v. Berry*, 42 Ill. 469; *Houser v. Tully*, 62 Pa. St. 92; *Elcox v. Hill*, 97 U. S. (Oct., 1878). It was determined in *Calye's case* that "it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open, but he ought to keep the goods and chattels of his guest there in safety." Notwithstanding it has been held in *Oppenheim v. White Lion Hotel Co.*, L. R. 6, C. P. 515, that where a guest omits to use his key and a thief entering through the unlocked door steals his goods, such omission may be given in evidence for the jury, showing contributory negligence on the part of the guest. Referring to *Calye's case*, Welles, J., said: "When Lord Coke in *Calye's case* refers to the authorities in the Year Books to show that the innkeeper is liable, though the guest has a key and does not use it, all he means is that the innkeeper cannot get rid of his common law liability by giving the guest a key. But he by no means lays it down that the guest may not be guilty of negligence in abstaining from using it."

In *Cashill v. Wright*, 6 El. & B. 891, it was held sufficient if "the negligence of the guest occasion the loss in such a way that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances." In *Armistead v. Wilde*, 17 Q. B. 261, it was said that the negligence must be gross; but this case is merely authority for the proposition that negligence of this degree will exonerate the innkeeper, without determining if any less degree would be sufficient. But negligence is frequently a relative term, depending very much upon the circumstances of each case, and is often a mixed question of law and fact: *Myers v. Cottrill*, 5 Biss. 465; *Purvis v. Coleman*, 21 N. Y., 111; *Shoecraft v. Bailey*, 25 Iowa, 553; *Fowler v. Dorlon*, 24 Barb. 384.

Where a guest at an inn takes his goods from his room into his personal custody, and puts them into a place in the inn, not designated by the innkeeper, and without his knowledge, and such place is one unusual, and manifestly hazardous and improper therefor, and they are thereby lost, the innkeeper is exonerated: *Fuller v. Coats*, 18 Ohio St. 343. So the liability has been held not to exist where a traveler had some boxes of jewelry, and desired a room to himself for the purpose of opening and showing the goods;

and a room was assigned him, and a key delivered with directions for locking the door, and he afterwards went away and left the room for some hours, with the key in the lock on the outside, and some of the boxes of jewelry were stolen: *Burgess v. Clements*, 4 M. & S. 306. Analogous to this is the case of *Myers v. Cottrill*, 5 Biss. 465, where a guest at a hotel took to his room valuable articles of merchandise, consisting of jewelry, and exposed them there for show and for sale, inviting an examination by purchasers, the hotel keeper, it was held, was not liable to the special liability of an innkeeper. Drummond, J., says: "I think this is the true rule of law on the subject. If a person going into a hotel as a guest, takes to his room not ordinary baggage, not those articles which generally accompany a traveler, but valuable merchandise, such as watches and jewelry, and keeps them there for show and sale, and from time to time invites parties into his room to inspect and purchase, unless there is some special circumstance in the case showing that the innkeeper assumes the responsibility as of ordinary baggage, as to such merchandise, the special obligations imposed by the common law do not exist, and the guest, as to those goods, becomes their vendor, and uses his room for the sale of merchandise, and really changes the ordinary relations between innkeeper and guest."

In a late case in Vermont, *Howe Machine Co. v. Pease*, 49 Vt. 477, it was held that the loss of goods or chattels put in charge of an innkeeper by a guest, gives rise to a presumption of the innkeeper's negligence; but this presumption may be repelled, not only by proof that the loss occurred through inevitable casualty or superior force, but by proof that he was not negligent, or proof that the goods or chattels were of a certain perishable or changeable kind, which would give rise to a presumption that their loss occurred in due course and order of things. In *Walsh v. Porterfield*, decided by the supreme court of Pennsylvania, October, 1878 (6 W. N. Cas. 149), the question of an innkeeper's liability, where there was negligence on the guest's part, was considered. The guest retired to bed after bolting his door, and during the night his watch and pocket-book were stolen. The latter contained, in addition to some money, a valuable diamond pin, which the guest was in the habit of wearing. The innkeeper was held liable; but he was permitted to give evidence that the guest was at the time intoxicated, in order to show contributory negligence.

The question of contributory negligence is for the jury: *Cashill v. Wright*, 6 El. & B. 891; *Jalie v. Cardinal*, 35 Wis. 118.

CRIMINAL LIABILITY OF INNKEEPER.—An innkeeper, by the common law, cannot without a reasonable excuse refuse to receive a guest. A refusal, where there is no valid excuse, will subject him to indictment: 2 Kent Com. 592; Story on Bailments, sec. 470; *Rez v. Ivens*, 7 C. & P. 213. He is bound to receive all guests who come, unless they are drunk or disorderly or afflicted with contagious diseases: Story on Contracts, sec. 903. If a person be disorderly, he may not only refuse to receive him, but after he has received him, he may eject him from the house: *Id.*; *Howell v. Jackson*, 6 C. & P. 723.

In this connection, a case in England, *Regina v. Rymer*, 2 Q. B. Div. 136, 8 C. 19 Eng. Rep. 261, decided in 1877, is instructive. The defendant was the proprietor of a hotel. Attached thereto, and under the same roof and license, but entered by a separate door from the street, was a refreshment bar, in which persons casually passing by obtained refreshments at a counter. The prosecutor, who was a householder living within twelve hundred yards, had been in the habit of coming to the bar with several large dogs, which had been found an annoyance to other guests, and letters had passed in which

the defendant had objected to the dogs being brought into the bar, and the prosecutor had asserted his right to bring them. The prosecutor subsequently, while taking a walk for pleasure, went with one large dog to the bar and claimed to be served with refreshments, which the defendant refused him. On an indictment charging the defendant, as an innkeeper, with refusing refreshments to the prosecutor, it was held that he could not be convicted; first, because the refreshment bar was not an inn; secondly, because the prosecutor was not a traveler; and thirdly, because had it been otherwise, the defendant had reasonable ground for his refusal.

STATUTORY PROVISIONS.—The strict liability of an innkeeper, under certain conditions, is now modified in England and in nearly all our states by statute. In England, by 26 and 27 Vict., c. 41, s. 1, it is enacted that no innkeeper shall be liable to make good to any guest any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of thirty pounds, except where such goods or property shall have been stolen, lost or injured through the willful act, default, or neglect of such innkeeper or any servant in his employ, or where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

By laws, 1855, c. 421, in New York, it is provided that "whenever the proprietor or proprietors of any hotel shall provide a safe in the office of such hotel, or other convenient place, for the safe keeping of any money, jewels, or ornaments belonging to the guests of such hotel, and shall notify the guests thereof by posting a notice (stating the fact that such is provided in which such money, jewels, or ornaments may be deposited) in the room or rooms occupied by such guest in a conspicuous manner, and if such guest shall neglect to deposit such money, jewels, or ornaments in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels, or ornaments sustained by such guest by theft or otherwise."

A similar act was passed in New Jersey in 1865; and Wisconsin in 1864: *Stewart v. Parsons*, 24 Wis. 241. Similar provisions are in the California Civil Code, sec. 1860.

The effect of the New York statute was considered in *Wilkins v. Earle*, 44 N. Y. 172, which holds that the statute so far modifies the common law liabilities of an innkeeper, so that it does not extend to money, jewels, or ornaments not deposited in the safe provided for that purpose, where the innkeeper has complied with the provisions of the act on his part. This liability is not limited to such an amount of money as may be reasonably necessary for the traveling expenses of the guest, but covers whatever amount may be received and deposited by the innkeeper in the safe. See *Bendetson v. French*, 46 N. Y. 266. In *Purvis v. Coleman*, 21 N. Y. 111, it is held that personal notice to a guest at an inn that a safe is provided for keeping money, jewels, etc., and that the innkeeper will not be liable for their loss if not deposited therein, is equivalent to posting up a written or printed notice. The statutory exemption of the innkeeper from the application of the common law rule making him liable as an insurer for the safe-keeping of the goods of his guests, is limited to the particular species of property named, and being in derogation of the common law, cannot be extended in its operation and effect by doubtful implication, so as to include property not fairly within the terms of the statute: *Ramalye v. Leland*, 43 N. Y. 539.

In a late case, decided in the United States supreme court, October, 1878, *Elcox v. Hill* (see 97 U. S.), this statutory liability was the first time considered by this court, and it was held that where a safe for the keeping of

money, jewels, and the like, of a guest at an inn, is provided by the landlord, and the notice given as required by the statute, a guest who fails to protect himself thereby, must bear his own loss, following *Stewart v. Parsons*, 24 Wis. 241; *Hyatt v. Taylor*, 42 N. Y. 258. And where the loss is occasioned by the negligence of the guest, there is no liability resting on the landlord.

SHIPPEY v. HENDERSON.

[14 JOHNSON, 178.]

PROMISE TO PAY DEBT DISCHARGED.—Where a debt has been discharged under proceedings in insolvency, and the debtor subsequently promises to pay the debt, it is sufficient for the creditor to declare upon the original contract alone. And, in reply to defendant's plea of such discharge, it will be sufficient to allege that defendant assented to, ratified, renewed and confirmed the promises mentioned in the declaration.

ASSUMPSIT. There were two counts in the declaration, one for goods sold and delivered, the other for money had and received. Plea, *non-assumpsit*, and discharge under the insolvent act from the debts declared upon. Replication, a renewal and confirmation of the promises set forth, made after the discharge. Demurrer and joinder.

Skinner, in support of the demurrer, urged that the plaintiff should have declared specifically on the new promise, and not on the original undertaking. The prior debt was the consideration of the new promise: Bac. Ab. Assumpsit, F; 6 Mod. 131; 1 Ld. Raym. 538; 2 H. Bl. 533, n. a; Cowp. 290, 514; 2 T. R. 765, 766; *Scouton v. Eislord*, 7 Johns. 36; 2 Id. 279. The discharge put an end to the debtor's liability, and there was no cause of action until the new promise. The exception to this rule in the case of an infant's contracts, is founded upon the reason that such contracts are voidable only, and not void; so, as to the statute of limitation, the debt remains, but the remedy is gone: 5 Burr. 2628. Admitting that the plaintiff might declare on the original undertaking, yet the replication ought to state the new promise.

Talcot, contra.

By Court, THOMPSON, C. J. The question that arises in this case is, whether the plaintiff may declare upon the original cause of action, or whether he is bound to declare specially upon the new promise. I think the proper way is to declare on the original cause of action. I see no reason why this case should differ from that of infancy, or that where the action is

barred by the statute of limitations. The discharge under the insolvent act does not make the original contract void; it is expressly laid down by Chitty, Pl. 40, that where a debt is barred by a certificate of bankrupt, a promise made afterwards by the bankrupt will support an action, and that it is sufficient in such case to declare upon the original consideration. Such promise can only revive a precedent good consideration, the remedy having been suspended by the discharge: 3 Bos. & P. 250, n. 7.

The new promise is sufficiently laid by the words ratified, renewed and confirmed. The words "renewed the said several promises," are peculiarly appropriate, and amply sufficient. The replication is no departure from the declaration, but fortifies and supports it by answering and removing the bar interposed by the plea. We are, accordingly, of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

See as to the correctness of this mode of pleading a ratification of a promise barred by the statute of limitations: *Essexlyn v. Weeks*, 12 N. Y. 637.

DUTCHESS COTTON MANUFACTORY v. DAVIS.

[14 JONSON, 220.]

SUBSCRIPTION, A PROMISSORY NOTE.—A subscription by which one agrees to pay to a corporation a certain sum for every share of stock set opposite his name, in such manner and proportion, and at such time and place as shall be determined by the trustees of the company, is a promissory note within the statute, although the word "bearer," or "order," is not used, and no consideration need be averred in the declaration.

ALLEGING DUE INCORPORATION.—In an action by an incorporated company for manufacturing purposes, it is not necessary to allege a due incorporation, as the act authorizing such incorporation is a public law, and the certificate on being filed becomes matter of record.

ESTOPPEL.—A person entering into a contract with a corporation, under its corporate name, cannot object that it had not been duly incorporated.

ASSUMPT, to recover the amount of certain installments payable by the defendant on thirty shares subscribed by him in the stock of the company. The subscription was as follows: "We whose names are hereunto subscribed, do, for ourselves and our legal representatives, promise to pay to the Dutchess Cotton Manufactory, the sum of one hundred dollars for every share of stock in the said Dutchess Cotton Manufactory, set opposite to our respective names, in such manner and proportion, and at such time and place as shall be determined by the trustees of

the said company. February 1, 1815." The defendant set the number thirty opposite his name. The declaration contained five counts, the first three being upon the writing as upon a promissory note, alleging demand upon the defendant for payment of the installments; notice to him by the trustees of the time, place and amount of payment, and refusal. The fourth count was for money lent, money paid, money had and received, and the fifth was on an *insimul computassent*. Demurrer and joinder.

Bloom and Oakley, in support of the demurrer, urged, first, that the subscription was not binding, no consideration being stated: *Jenkins v. Union Turnpike Co.*, 1 Cai. Cas. 86. The plaintiffs should have declared on the subscription as a special agreement, and have set forth the consideration: *Id.* There was no mutuality in the contract, it does not appear that the plaintiffs were liable to the defendant for the stock. It does not appear that the plaintiffs were legally incorporated, or had a capacity to sue. Such an averment is material: *Highland Turnpike Co. v. McKean*, 10 Johns. 154 [6 Am. Dec. 324]; *Worcester Turnpike Co. v. Willard*, 5 Mass. 80 [4 Am. Dec. 39]; *Delaware Canal Co. v. Sansom*, 1 Binn. 70.

J. Tullmadge, contra.

By Court, THOMPSON, C. J. Since the decision of this court in the case of *The Goshen Turnpike Co. v. Hurin*, 9 Johns. 217 [6 Am. Dec. 273]. The question whether an action will lie at all upon a promise by a stockholder, in a corporation like the present, to pay his installments ought to be considered at rest, at least in this court. We then took occasion to notice the decision of the court of errors in the case of the *The Union Turnpike Co. v. Jenkins*, 1 Cai. Cas. 86, and concluded that although one of the members of the court in delivering his opinion, thought that the only remedy was a forfeiture of the shares, and all previous payments, yet that was not the point on which the decision turned, but on the ground taken by the chancellor, that the condition upon which Jenkins was to become a member of the company, viz., paying ten dollars, had not been performed, and that the corporation was not considered *in esse* at the time of making the promise by Jenkins.

In the case against Hurin, we considered the note which was like the one set forth in the declaration in this cause, as a promissory note within the statute, though it had not the words bearer or order, and therefore it was not requisite that a con-

sideration should be averred, or appear upon the face of the note. But in that case, as in this, there is a consideration appearing on the face of the note. It was a promise to pay one hundred dollars for each share of stock set opposite the defendant's name, to wit, thirty shares, and it is to be intended that the defendant had become a stockholder to that amount.

The only question of doubt that can arise in this case is whether it was not necessary for the plaintiffs to set forth in their declaration, by fit and proper averments, that they had been duly incorporated. But I am inclined to think it was not.

The general act relative to corporations for manufacturing purposes (1 R. L. 249) directs the certificate, which is to contain the requisite evidence of the company's having become a body politic or corporate, to be filed in the office of the secretary of state, and declares that as soon as such certificate shall be so filed, the persons who shall have signed and acknowledged the same, and their successors, shall become a body politic and corporate. This is a public law, and the certificate becomes matter of record. The incorporation ought not therefore to be considered a mere private act, since it was under the general law of the state, and the evidence thereof is made matter of record. But the defendant having undertaken to enter into a contract with the plaintiffs in their corporate name, he thereby admits them to be duly constituted a body politic and corporate under such name. The case of *Henriques v. The Dutch West India Company*, 2 Ld. Raym. 1535, is very much in point on this question. It is there laid down by the counsel, and appears to be adopted by the court, that the plaintiffs in error were estopped by the recognizance they had entered into with the defendants in error, from saying there was no such company; and that where an action is brought by a corporation, they need not show in the declaration how they were incorporated, but upon the general issue pleaded by the defendant, the plaintiffs must prove they are a corporation. The same principle was substantially adopted by this court in the case of *The Bank of the United States v. Haskins*, 1 Johns. Cas. 132; and in *Jackson v. Plumb*, 8 Johns. 378. The opinion of the court therefore is, that the plaintiffs are entitled to judgment upon the demurrer.

Judgment for the plaintiffs.

The authority of this case is frequently recognized in New York upon the various questions it decides. Upon the point that the provision in the charter of an unincorporated company, allowing the forfeiture of stock and previous

payments, does not deprive the company of its common law remedy to recover the amount of the subscription, the case is followed in *Small v. Herkimer Mfg. Co.*, 2 N. Y. 339; *Burrows v. Smith*, 10 Id. 566; *Troy Turnpike, etc., Co. v. M'Chesney*, 21 Wend. 299. Upon the point that a person is estopped from denying the corporate existence of a company with which he has contracted in its corporate name, *Smith, J.*, in *Black R. & Utica R. R. Co. v. Clarke*, 24 N. Y. 209, referring to this case, says: "The soundness of this rule of evidence has been asserted in numerous cases: *Palmer v. Lawrence*, 3 Sandf. 170; *Steam Navigation Co. v. Weed*, 17 Barb. 382. It was questioned in *Welland Canal Co. v. Hathaway*, 8 Wend. 480, but that case did not present the point between a corporation and one of its own stockholders." See also *Eaton v. Aspinwall*, 19 N. Y. 121; *Howland v. Edmonds*, 24 Id. 316; *Worcester Medical Institution v. Harding*, 11 Cush. 239.

In *Angell & Ames on Corporations* this case is cited in secs. 70, 83, 513, 549, 632 and 635.

PEOPLE v. ANDERSON.

[14 JOHNSON, 294.]

NO LARCENY BY FINDER.—The *bona fide* finder of a lost article, as a trunk lost from a stage-coach and found on the highway, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found.

INDICTMENT for stealing a trunk. The cause came before this court on a writ of *habeas corpus*. The case is stated in the opinion.

Seeley and Starkweather, for the prisoner.

Van Buren, contra.

By Court, SPENCER, J. The prisoner was convicted at the last court of oyer and terminer, and gaol delivery held in and for the county of Otsego; and a question of law having arisen on the trial, sentence was respited and he has now been brought up on *habeas corpus* to receive the judgment of this court. On the trial it came out in proof, that the articles for the stealing of which the prisoner was indicted were contained in a trunk, and that he found this trunk on the highway. The court below instructed the jury that if the prisoner took the trunk with intention to steal it, they ought to find him guilty, and that in determining that question they had a right to take into consideration the prisoner's subsequent conduct, as well as all the circumstances of the case.

We assume it as an undisputed fact, that the prisoner found the trunk *bona fide*, and consequently that it had been lost by its proprietor; and we proceed on the ground that if any subse-

quent embezzlement of the contents of the trunk would make the act a larceny of those articles, that then the conviction is correct. But the court are of the opinion that the *bona fide* finder of a lost article, or of a lost trunk containing goods, cannot be guilty of larceny by any subsequent act of his, in concealing or appropriating to his own use the article, or the contents of a trunk thus found. In *Buller's case*, in 28 Eliz., this doctrine is fully established. In that case it was decided that the intent to steal must be when it comes into the hands or possession of the party; for if he hath the possession of it once lawfully, though he hath *animus furandi* afterwards, and carry it away, it is no larceny: 3 Inst. 107. Again, Lord Coke lays down the law, as drawn from the year books, 3 Inst. 107, to be that if one lose his goods, and another find them, though he convert them *animo furandi*, to his own use, yet it is no larceny, for the first taking is lawful. So, he says, if one find treasure trove or waif, or stray, and convert them, *ut supra*, it is no larceny, both in respect of the finding, and also for that *dominus rerum non apparet*. The same doctrine will be found in 1 Hale, P. C. 506, and 1 Hawk. 208, secs. 1, 2. In 2 East, P. C. 663, it is expressly stated that where one finds a purse in the highway, which he takes and carries away, it is no felony, although it may be attended with all those circumstances which usually prove a taking with a felonious intent, such as denying or secreting it.

It cannot be doubted that an indictment for a larceny must charge that the goods were feloniously taken, as well as feloniously carried away, and hence it is an established position that if the taking is not an act of trespass, there can be no felony in carrying away the goods: 1 Hawk. Ch. 33; Kelyng, 24; Dalton, 3. There can be no trespass in taking a chattel found in the highway, and the finder has a right to keep the possession against every one but the true owner. How, then, can it be said that a thing found *bona fide*, and of which the finder had a right to take possession, shall be deemed to be taken feloniously in consequence of a subsequent conversion, by denying and secreting it, with an intention to appropriate it to the use of the finder?

It was urged, on the part of the people, that the same test ought to be applied in the case of the finding of a chattel, and its subsequent conversion to the use of the finder, to ascertain the felonious intention, as has been applied where goods, and particularly horses and carriages, have been feloniously obtained under the pretense that the person applying for and obtaining

them, would use them for a certain specific purpose, and then has gone off with them, and converted them to his own use. On a slight examination, the cases will be found to be very dissimilar; in the latter case, there must have been an original felonious intention, and unless this can be fairly deduced from all the facts in the case, it is no felony. Where that original felonious intention exists, although the person having it has obtained the consent of the proprietor to let him have the possession for one purpose, he intended to get it for another and far different purpose, and he, therefore, never had the possession for this different and fraudulent purpose, and may be fairly said to have acquired possession feloniously.

It is not so with regard to a person coming fairly into the possession, by finding. No fraud is practiced on any one, in first acquiring the possession. It, therefore, never can be a question with a jury, how far forth a person who found a chattel intended to find it for the purpose of stealing it. The very nature of the case excludes a premeditated or already-formed intention to steal. That depends, as matter of fact, upon a variety of circumstances, such as the value, the facility of concealment, etc., which are matters of after consideration. Hence, we do not find a single case, in the reports of criminal trials, or in the treatises on criminal law, in which it has ever been intimated that a person actually finding a chattel has been held to have stolen it, from the circumstance of denial, concealment or appropriation; nor from the happening of any of those facts, which, in reference to the taking of chattels, ordinarily shows a felonious intention. It is true that there are cases in which, though the party apparently had the possession of the chattel, yet the taking has been adjudged felonious. The case of a guest at a tavern, or of a gentleman's butler, who have taken the things committed to their use or care, are mentioned in the books as illustrative of the principle that the mere naked possession for a special purpose will not protect the party, if he take it away feloniously. So if a bailee, of a bale or trunk of goods, break the bale or trunk, and take and carry away a part of the goods, with intent to steal them, it is larceny; but if he carry them to a different place than the one agreed upon, and convert the whole to his use, it is not larceny. East, 2 C. L. 695, observes that this distinction seems to stand more upon positive law, not now to be questioned, than upon sound reasoning, and he adopts Lord Hale's reasoning, that the privity of contract is determined by the act of breaking the package, which

makes him a trespasser, and that, therefore, it makes no difference whether he takes all or a part only of the goods after the package is broken. There can be no analogy between this case and that of the carrier who breaks the package, or opens a trunk, *animo furandi*, because the finder of goods has them not in virtue of any contract, and violates none, in opening a bale or trunk.

The court believe that it would be an innovation on the criminal law to consider this as a case of larceny; and they, therefore, direct the prisoner to be discharged.

THOMPSON, C. J., dissented.

Prisoner discharged.

Mason, J., delivering the opinion of the court in *Wilson v. People*, 39 N. Y. 461, after referring to the language in 3 Coke's Inst. 107, *supra*, proceeds: "Such is the rule established by an unbroken current of decisions in England and this country. I will content myself by referring to a few of the adjudged cases in England and in this state: *Button's case*, 28 Eliz.; 2 East's Pleas of the Crown, p. 553; 1 Leach, 411; *Rea v. Leach*, 2 East P. C. 694; *Rankin's case*, Russ & Ryce, 44; *The People v. Anderson*, 14 Johns. 294; *The People v. Call*, 1 Denio, 120. The rule has become elementary, and is supported by Blackstone, Chitty, Russell, Roscoe, Hawkins, Hale, Lord Coke, East, Leach, Starkie, Wharton, Barbour, and, in short, by all of the elementary writers that I have consulted: 2 Stark. Ev. 606; 4 Black. Com. 232; Ros. Cr. Ev. 583, 541; Wharton Am. Cr. Law, 1752, 5th edition; 1 Hale, 504; 1 Hawkins, chap. 33, sec. 2; Arch. Cr. Pl. 186, 189."

The same principle is recognized in an able decision in *Hunt's case*, 13 Gratt. 761, where it is said: "A man finding a chattel actually lost may instantly take possession thereof *animo furandi*, that is, with the intent to usurp the entire dominion over it, and in pursuance thereof does convert it to his own use. Such conduct, in a moral aspect of the transaction, may be as dishonest as to steal it, for although he may not know the owner, or there be nothing in the circumstances attending the place where it is found, or the marks thereon to indicate the true owner, yet he must be conscious that there was an owner, and he should use all proper diligence to trace him out. Yet as the property was in fact lost and the owner unknown, and no marks existing to indicate who he is, such a taking *animo furandi* and conversion is not larceny, because there was no trespass in the taking, as the possession acquired could not be said to be against the will of the owner, under the reason of the rule given by Lord Coke, *quia dominus rerum non apparet ideo cuius sunt incertum est*."

A full examination of this question will be found in *Regina v. Thurborn*, 5 Br. C. C. 387, the doctrine of which case was afterwards approved in *Regina v. Preston*, 6 Id. 353. In the first case Baron Parke holds: "The result of these authorities is, that the rule of law on this subject seems to be that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner can not be found, it is not larceny. But if he takes them with the like intent,

though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. * * * If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either."

See 1 Bishop Cr. Law, sec. 207, and cases cited, where it is laid down that larceny, which is composed of the act of trespass and the superadded intent to steal, is not committed when this trespass and this intent do not exist at the precise moment together.

MURRAY v. BOGERT.

[14 JOHNSON, 212.]

CLAIM FOR CONTRIBUTION.—One who has paid a judgment recovered against him for an entire demand for which another, not a party to that suit, was jointly liable with him, cannot maintain an action against him for contribution.

SELLING INTEREST IN PARTNERSHIP.—A partner cannot by selling his interest in the partnership to a third person, make him a partner against the will and consent of the other partners.

PARTNER SUING AT LAW.—No action at law lies by one partner against another where there has been no settlement of the partnership accounts, and no promise by the defendant to pay the balance struck.

ASSUMPSIT. It appeared that Murray, Kane, Mumford and Mansfield agreed upon a venture to the island of St. Domingo, each to pay one fourth of the expense of fitting up vessels, etc., and to receive the proceeds of the return cargoes in like proportion, and appointed Forbes supercargo. One month afterward, Mansfield sold one half of his interest to the defendants Bogert and Kneeland. On the return of the vessels, the proceeds were divided, Mansfield, Bogert and Kneeland receiving one fourth. Some dispute arising as to expenses incurred by Forbes, the supercargo, he brought an action against the plaintiff, Kane, Mumford and Mansfield, and recovered judgment; this judgment was satisfied by the plaintiff, Kane and Mumford. The plaintiff then commenced this action against Mansfield, Bogert and Kneeland to recover the proportion due from them to Forbes, which sum plaintiff had paid. A nonsuit was granted on the ground that the demand grew out of a partnership transaction, and could not be enforced at law. Motion to set aside the nonsuit.

S. Jones, jun., and D. B. Ogden, for the plaintiff.

Wells, contra.

By Court, THOMPSON, C. J. The motion to set aside the non-suit must be denied. There is no principle that can be assumed, under the facts in the case, which will sustain the action. It cannot be supported on the principle of contribution. The defendants were not parties to the judgment which Forbes recovered against the plaintiff and others; nor could they have been made parties. The contract upon which Forbes recovered that judgment was made by him, with Murray, Kane, Mumford and Mansfield. But whether the defendants could have been connected with them in that suit or not is immaterial as it respects the question of contribution. They were not made parties, nor did the defendants in that suit plead in abatement that they ought to have been made parties. That judgment, therefore, shows no privity or joint responsibility between the defendants in that judgment and the defendants in this suit, nor do the facts in this make out a partnership. Admitting that the transaction as between Murray, Kane, Mumford and Mansfield was a partnership concern, Mansfield could not, by selling out a portion of interest to Bogert and Kneeland, make them partners against the will and consent of the other parties. This would be a very dangerous principle to admit into the doctrine of partnership.

Admitting, however, that the defendants were, by the purchase made from Mansfield, constituted partners in the transaction, another insuperable difficulty arises against maintaining the action at law; it is a principle too well settled to be shaken, that partners cannot sue each other at common law. There is nothing in the case showing a settlement of the partnership accounts, and balance struck, and a promise by the defendants to pay, so as to maintain the action on that ground. In whatever point of view, therefore, the case is considered, the plaintiff was properly nonsuited, and the present motion must be denied.

Motion denied.

SCOVILLE v. CANFIELD.

[14 JOHNSON, 338.]

STATUTES OF OTHER STATES.—Where the statute of another state makes penal the purchase of choses in action by certain officers, but operates only as to the remedy without affecting the validity of the debt, such statute cannot be pleaded in this state to an action by the assignee of a judgment recovered in the former state.

LEX FORI TO GOVERN.—In construing and giving effect to contracts, the *lex*

loci is to be considered; but in administering justice between the parties, the law of the place where the remedy is sought must govern as to the forms of procedure.

PENAL LAWS OF OTHER STATES.—The penal laws of one state can have no operation in another state; they are strictly local.

ASSUMPT on a judgment recovered by the plaintiff against the defendant in Connecticut. Plea, 1. The general issue; and, 2. A special plea setting forth an act of the legislature of the state of Connecticut, entitled, "An act to prevent unlawful maintenance," which prohibited and rendered penal the purchase of a chose in action by an attorney, counselor at law, sheriff, deputy sheriff or constable, except in certain cases; and stated further that this action was prosecuted in the name of the plaintiff by one Beecher, a constable of the town of Sharon, of Connecticut, who had purchased the judgment from the plaintiff while constable, contrary to the meaning of the act, and not within any of its exceptions. Demurrer to this plea and joinder.

Swift, in support of the demurrer.

P. Ruggles, contra, cited 8 Johns. 263 [3 Am. Dec. 482]; 1 Johns. Cas. 411; 12 Johns. 343; 2 Cai. Cas. 822.

By Court, **SPENCER, J.** The plea cannot be sustained. Were we to give full effect to the statute, and consider it as attaching on the debt assigned, we could not say that the assignment extinguished or even invalidated the original judgment. The act pleaded contains nothing which in any way impairs the force and effect of the chose in action assigned; the penalty inflicted operates merely on the person offending against the act by buying; it could not be the intention of the legislature to annihilate the debt assigned. This is rendered very manifest, when it is noticed that the effect of its being proved or admitted that the buying the chose in action was in contravention of the act, is that the plaintiff shall be nonsuited, this not being a bar to another suit; the parties, even in Connecticut, might disaffirm the contract of sale, and then a new suit might be maintained for the debt before assigned.

But there is a greater difficulty still, although we notice the *lex loci* in construing and giving effect to the contract between the parties, we must administer justice to them, according to our laws and the forms prescribed by our legislature, or the usages of our courts of justice. This principle was distinctly recognized and adopted in the case of *Lodge v. Phelps*, 1 Johns.

Cas. 189; and^d in *Ruggles v. Keeler*, 3 Johns. 263 [3 Am. Dec. 482]. That part of the statute of Connecticut set forth in the plea, which under certain circumstances authorizes their courts to nonsuit the plaintiff if it shall appear that the chose in action has been bought, contrary to its provisions, was not addressed to the courts of other states, and had it been so it would have been nugatory and unavailing.

There is another decisive answer, as regards the act pleaded. The plea admits the validity of the judgment declared on, and we are called on by the defendant not to apply the *lex loci* in the construction of the contract; but we are required to give effect to a law which inflicts a penalty for acquiring a right to a chose in action. The defendant cannot take advantage of, nor expect this court to enforce, the criminal laws of another state. The penal acts of one state can have no operation in another state. Penal laws are strictly local, and affect nothing more than they can reach: *Fblot v. Ogden*, 1 H. Bl. 185; Cowp. 343.

Judgment for the plaintiff.

As to the local nature of penal laws, this case is followed as authority in *Delafeld v. State of Illinois*, 2 Hill, 169; *Teall v. Felton*, 1 N. Y. 546; and is cited in Story's *Conflict of Laws*, sec. 621, where the doctrines as prevailing in different countries are collected.

LOW v. MUMFORD.

[14 JOHNSON, 426.]

TORTS—ACTIONS WHETHER JOINT OR SEVERAL.—As a general rule in actions in form *ex delicto*, for a tort committed by several, the plaintiff may sue any of them, and the non-joinder of others cannot be pleaded in abatement; but where the action relates to real property, if it be such as to draw in question the title, all those jointly concerned should be made co-defendants.

ERROR to a justice's court. The plaintiff in error brought an action against the defendants in error "for keeping up a mill-dam on the Susquehannah river below the lands of the plaintiff, whereby the water of the river was set back and flowed the plaintiff's lands," etc. Plea in abatement, that the land on which the mill-dam was erected and the mills appurtenant thereto were held in joint tenancy by the defendants and certain other persons, who were not made parties to the suit.

Judgment for the defendants.

By Court, PLATT, J. The general rule on this^o subject is that if several persons jointly commit a tort, the plaintiff has his election to sue all or any of them, because a tort is in its nature a separate act of each individual, and therefore, in actions in form *ex delicto*, such as trespasses, trover, or case for malfeasance against one only, for a tort committed by several, he cannot plead the non-joinder of the others in abatement or in bar: 1 Chitty's Pl. 75. There is a distinction, however, in some cases, between mere personal actions of tort and such as concern real property: *Id.* 76. In the case of *Mitchell v. Turbutt*, 5 T. R. 65, Lord Kenyon recognizes this distinction and says: "Where there is any dispute about the title to land, all the parties must be brought before the court." A case in the year books, 7 Hen. IV. 8, shows that a plea in abatement may be well pleaded for this cause to an action on the case for a tort. An action of trespass on the case was brought against the abbot of Stratford, and the plaintiff counted that the defendant held certain lands, by reason whereof he ought to repair a wall on the bank of the Thames; that the plaintiff had lands adjoining, and that for default of repairing the wall, his meadows were drowned. To which Skrene said: "It may be that the abbot had nothing in the land, by cause whereof he should be charged, but jointly with others, in which case the one cannot answer without the other."

But in actions for torts relating to lands of the defendants, there seems to be ground for this further distinction, viz., between nuisances arising from acts of malfeasance, and those which arise from mere omission or nonfeasance. The case of the abbot of Stratford was that of a nuisance arising from neglect of duty in not repairing the wall, which was by law enjoined on the proprietor or proprietors of the land on which the wall stood. The gist of the action, therefore, was that the defendant was such proprietor, and neglected a duty incident to his title. The title to the land on which the nuisance existed was, therefore, directly in question; for if the abbot was not the owner of the land he was not chargeable with neglect, nor liable for the nuisance. But in this case the action is for a nuisance arising from an act of misfeasance, the "keeping up a mill-dam on a stream below the plaintiff's land." Here needs no averment that the defendant owned the land on which the dam was kept up. The title to that land cannot come in question in this suit, for the maintaining such a dam is equally a nuisance, and the defendants are equally liable for damages,

whether the defendants own the land as joint tenants with others, or whether they are sole proprietors, or whether they have any right whatever in it. "Keeping up" the dam implies a positive act of the defendants; it is a malfeasance, and therefore the plaintiff has a right of action against all or any of the parties who keep up that dam. Unless the title comes in question there is no difference in this respect in cases arising *ex delicto* between actions merely personal, and those which concern the realty. The plaintiff in such an action is always bound to join his co-tenants, because his title must come in question as the foundation of his claim; but he may sue any or all who have done the tortious act. The justice, therefore, erred in deciding against the demurrer to the plea in abatement, and the judgment must be reversed.

Judgment reversed.

CONNECTICUT v. JACKSON.

[1 JONES. CH. 12.]

COMPOUND INTEREST.—Interest upon interest is never allowed except upon a settlement of accounts between the parties, after interest had become due, or upon an agreement for that purpose, subsequent to the original contract, or upon a master's report, which has been confirmed, computing the principal and interest due.

COMPUTATION OF INTEREST.—Rule for computing interest in case of partial payments, stated.

MOTION for confirmation of a master's report computing the principal and interest due on the defendant's bond and mortgage, and allowing compound interest thereon without any special agreement of the parties, or any settlement of accounts.

Sedgwick, for the motion.

KENT, Chancellor. This allowance of compound interest is inadmissible, and the report must be sent back to the master for correction. There are cases in which the interest is considered as changed into principal, and permitted to carry interest, as when a settlement of accounts takes place after interest has become due, or an agreement is then made, that the interest due shall carry interest, or the principal and interest are computed in a master's report, and the same is confirmed. But, except in some such special cases, interest upon interest is not allowed, and the uniform course of the decisions is against it, as being a hard and oppressive exaction, and tending to usury. Even an original agreement, at the time of the loan or contract, that if

interest be not paid at the end of the year, it shall be deemed principal and carry interest, will not be recognized as valid. Such a provision would not amount to usury, so as to render the contract connected with it illegal and void at law: *Le Grange v. Hamilton*, 4 T. R. 618; 2 H. Bl. 144. But this court certainly, and, perhaps, a court of law, would not give effect to such a provision.

It will be useful to look into the decisions on this question of compound interest. As early as the case of *Davis v. Higford*, 4 Car. 1; 1 Chan. R. 15, the court laid down the rule, that interest upon interest was not allowed, and that has been the general language of the court of chancery down to this day, with but few exceptions. In *Smith v. Pemberton*, 17 Car. 11; 1 Chan. Cas. 67, an exception was allowed in favor of the assignee of a mortgage, and the amount of the principal and interest, really and *bona fide* due, and paid by him, was allowed to carry interest. The entire sum was considered as principal. But this case was afterwards overruled in *Potter v. Hubbell*, 24 Car. 11; 2 Chan. R. 44; 3 Id. 43, for it was decided by Lord Chancellor Shaftesbury, assisted by the judges, Vaughan and Rainsford, that the assignee of a mortgagee ought not to be in a better condition than the mortgagee, and no interest was allowed, but on the original principal sum. Afterwards in *Macclesfield v. Fitton*, 36 Car. 11; 1 Vern. 168; the lord keeper expressed his disapprobation of this precedent, and said that the allowance of interest on interest, in the case of an assignee of the mortgagee was reasonable. It does not appear, however, that he ventured to overrule it, though in the subsequent case of *Gladman v. Henchman*, 2 Vern. 135, such interest was allowed, and the loose *dicta* in the ancient books are contradictory on the point: 1 Chan. Cas. 256; 1 Freeman, 303; 2 Id. 142. Perhaps, therefore, it may be considered as a doubtful question, on the ground of these ancient authorities, whether the assignee of a mortgagee, on a bill to redeem, be not entitled to interest on the whole sum which he paid. Nor are the imperfect cases in the reign of Charles II., uniform or consistent; even on the general question whether compound interest can be allowed, the *dicta* are both ways: *Bradbury v. Bucks*, 2 Chan. R. 148; *Howard v. Harris*, 2 Chan. Cas. 147; *Chamberlain v. Chamberlain*, 1 Id. 256; *Anonymous*, 2 Freeman, 142, are in favor of, and *Ranelagh v. Thornhill*, 2 Chan. Cas. 153, against such interest. But those cases are too loose and imperfectly reported, to be deemed of authority, and the cases since the English revolution, in 1688, have established,

beyond controversy, the general rule which has been mentioned, and those cases are so well reported, and have the sanction of such eminent names, as to be entitled to confidence.

In *Chesterfield v. Cromwell*, in 1701, 1 Eq. Cas. Abr. 287, B., Lord Keeper Wright admitted the general rule that interest could not carry interest, but held that, in some cases, it would be injustice not to regard the interest due as principal; as where the defendant's mother, with her assent, she being near of age, stated an account of the interest long in arrears, and the account was fair, and the settlement necessary for the infant's maintenance. In *Brown v. Backham*, 1720, 1 P. Wms. 652, Lord Chancellor Parker questioned whether, if the mortgagor ever signed an account, admitting so much due for interest, it would make the interest principal, as it did not show an agreement for that purpose, and he thought a writing would be requisite. And in *Waring v. Cunkiffe*, 1 Ves. jun. 99, Lord Thurlow said that he found the court of chancery in the constant habit of thinking that interest ought not to carry interest, and that he must overturn all the proceedings of that court, if he allowed it. In short, chancery will not allow compound interest, unless where there is the settlement of an account between the parties after the interest has become due; or there has been an agreement for that purpose, subsequent to the original contract, or where the master's report, computing the sum due for principal and interest, is confirmed; for it is then in the nature of a judgment: *Mosely*, 27, 246; 2 Ves. 471; 1 P. Wms. 652. The cases and language in the books are clear in acknowledging the rule, that even an agreement made at the time of the original contract, to allow interest upon interest, as it should become due, is not to be supported: *Lord Ossulston v. Lord Yarmouth*, 2 Salk. 449; *Case of Sir Thomas Meers*, cited in *Cas. Temp. Talbot*, 40, and 1 Atk. 304; Lord Eldon in *Chambers v. Goldwin*, 9 Ves. jun. 271.

This review of the current of decisions shows the existence of the general principle, and the exceptions and limitations by which it is attended. And though creditors will be very apt to think, with Lord Thurlow, that there is nothing unjust in compelling a debtor, who neglects to pay interest, when it becomes due, to pay interest upon that interest, yet the wisdom of our law has ordained otherwise. The Roman law was constant in its condemnation of compound interest. *Nullo modo usurae usurarum a debitoribus exigantur, et veteribus quidem legibus constitutum fuerat*, etc.: Code 4, 32, 28; Voet. Conv. ad Paud.

lib. 22, tit. 1, pl. 20. And it appears to me that this provision in the law is not destitute of reason and sound policy. Interest upon interest, promptly and incessantly accruing, would, as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculation and endurance. Common business cannot sustain such overwhelming accumulation. It would tend also to influence the avarice, and harden the heart of the creditor. Some allowance must be made for the indolence of mankind, and the casualties and delays incident to the best-regulated industry; and the law is reasonable and humane which give to the debtor's infirmity, or want of precise punctuality, some relief in the same infirmity of the creditor. If the one does not pay his interest to the uttermost farthing, at the very moment it falls due, the other will equally fail to demand it with punctuality. He can, however, demand it and turn it into principal, when he pleases; and we may safely leave this benefit to rest upon his own vigilance or his own indulgence. Huberus says, that neither the law of benevolence, nor of public utility, will permit interest upon interest: *Sed lex charitatis et publicæ utilitatis non patitur, ut mutui debitor, qui in mora solvendi usuram ob angustiam rei pecuniariæ deprehenditur, nova usura adfligatur, qua re familiæ ad incitas rediguntur; ideoque legibus sub poena infamiae prohibetur. Imo nec si consenserit debitor, ut usura commissa in sortem transferatur, vel obligationi principali adjiciatur, licitum est usura:* Prælec. Juris. Rom. lib. 22, tit. 1, §. 6.

The rule for casting interest when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of the interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance as aforesaid.

Let the master, therefore, take back the report, and correct the calculation.

See *Selleck v. French*, 6 Am. Dec. 185, and note, where the subject is discussed, and this case noticed.

GREEN v. WINTER.

[1 JOHN. CH. 27.]

PURCHASE OF LIENS BY TRUSTEE.—A trustee can derive no benefit from a contract in reference to the subject of the trust. Accordingly, where he purchases a mortgage or a judgment at a discount which was a lien on the trust estate, he cannot be allowed to derive an advantage from such purchase.

NOT ALLOWED FOR IMPROVEMENTS.—Where there was a trust to sell land, to raise money, to pay off incumbrances, etc., it was held that a trustee should not be allowed for improvements of the trust estate, though made in good faith, as in building houses and mills, clearing lands and making roads. He is entitled only to necessary expenditures, as for repairs, etc.

LIABILITY FOR RENTS AND PROFITS.—A trustee refusing to account to referees for rents and profits of certain parts of the trust estate is chargeable with the reasonable income of such rents and profits, in the judgment of the referees.

WHEN CHARGEABLE WITH LOSS.—A trustee agreed to purchase and pay for a farm for the use of the *cestui que trust*, out of the proceeds of the trust estate. He purchased, and gave his bond, secured by a mortgage on the premises; but he refused to pay the bond when due, and procured a foreclosure of the sale of the farm by the mortgagee, at a loss. He was held liable for this loss and for costs of suit.

EXCEPTIONS filed to a report of certain referees. The material points only of the decision are here given, as some points are now unimportant, being regulated by statute, as the point holding a trustee is not entitled to compensation for services, which is now determined by statute. The facts of the case are sufficiently stated in the portions of the opinion taken to sustain the points here given in the syllabus.

Pendleton, for plaintiffs.

Harrison, for defendant.

KENT, Chancellor. The facts stated in the report are conclusive against the claim of the defendant in respect to the mortgage given by Green and his wife to Ogden and Hoffman. It appears that this mortgage was executed in July, 1704, on part of the trust estate, to secure the payment of two bonds; that the mortgage was not registered until after a conveyance to Sands and Lothrop; that after judgment was entered on the bonds, the defendant bought in the same, in January, 1810, at a discount, and issued execution against Green. The defendant refused to answer before the referees whether he had the mortgage as a lien on the trust estate. This purchase ought justly and upon all sound principles of equitable policy to enure to the benefit of the trust, and not to the benefit of the trustee.

It would be an extremely wrong thing, as the lord chancellor said in *Norris v. Le Neve*, 3 Atk. 37. The principle is the same as to buying in the trust estate, or buying securities upon it. A trustee cannot act for his own benefit, in a contract upon the subject of the trust: *Morret v. Paske*, 2 Atk. 52; *Forbes v. Ross*, 2 Bro. 430. The object of the rule is to keep trustees within the line of their duty. A court of equity watches the conduct of a trustee with jealousy; and if he compounds debts or mortgages, or purchases them in at a discount, he shall not be suffered to turn the speculation to his own advantage: 3 P. Wms. 249, n. (a.); 1 Salk. 155. * * *

The same principle supports the exception to the allowance including interest for expenditures for improvements of the trust estate, as by building houses and mills, clearing land, making roads, etc. These expenses were not within the purview of the trust which went only to authorize the defendant to sell the land, to raise money to pay off the incumbrances, and to restore the residue of the estate. The referees report that the improvements were made in good faith, but that in general they were of no real or substantial value to the trust property. These charges appear to be still more exceptionable than those under the head of compensation; and to tolerate such wide deviations from the nature and terms of the trust would be creating a most dangerous precedent. It would be placing trust property in the greatest jeopardy, and perhaps incumbering it with burdens too grievous to be borne. I cannot, therefore, admit of any allowances under this head, but such as may justly be considered reparations or repairs, and these do not appear, from the report, to exceed much, if any, the sum of seven hundred dollars. Nor is this point left without a clear and explicit sanction in the decisions of the court of chancery.

It is the established doctrine that a trustee can only be allowed for necessary expenditures: *Fountain v. Pellet*, 1 Ves. jun. 337; and the *cestui que trust* has always his option to take or refuse the benefit or loss of the unauthorized act of his trustee: *Harrison v. Harrison*, 2 Atk. 120; 2 Bro. 656-8. The case of *Bostock v. Blakeny*, 2 Bro. 653, is quite analogous to the present. That was a trust to purchase land, and the land was purchased, and money expended in repairs and improvements; and though the improvements were substantial and lasting, the chancellor would not admit of such an application of the funds of the trust. It must be, and always has been, the anxious wish of a court of chancery to save a trustee from harm while acting in good faith; but a misapplication of the trust property, by

going out of the trust, can never be permitted to injure the *cestui que trust*, without his assent: 2 P. Wms. 433; 3 Atk. 441.

* * * Another objection by the plaintiffs is that the defendant ought to have been charged with such rents as the report states that the trust estate would reasonably have produced; inasmuch as the defendant refused to exhibit to the referees, though repeatedly called on for the purpose, a statement of leases or other contracts for renting the farm belonging to the trust estate. This appears to me to be perfectly just, under the circumstances of this refusal, and the defendant ought to be charged with such reasonable rents, from and after his assumption of the trust, in those cases in which the report states what would be a reasonable rent, and except in the special cases already mentioned.

The last objection relates to what is termed the Bayside farm. It appears that the defendant agreed to purchase this farm for Mrs. Green, and to pay for the same out of the proceeds of the trust estate; that he purchased it in March, 1806, and gave his bond and mortgage to be foreclosed, and also a suit in ejectment to be instituted, by means of which Mrs. Green was obliged to abandon the farm. The referees report that the defendant had paid on account of this farm six thousand seven hundred and fifty-one dollars and forty-four cents, and had received on the sale of it four thousand three hundred and fifteen dollars and seventy-eight cents, and they charge the costs of the suits and the loss on the sale of the farm to the trust estate. The question is, on whom this heavy loss ought to fall—on the defendant, or on the *cestui que trust*? Here was a trust voluntarily undertaken by the defendant, and he refused eventually to pay for the farm according to his original undertaking, out of the trust estate, when he either had funds in hand to pay, or the means in his power to raise them. It appears to be an inequitable proceeding on the part of the defendant, and no just reason is given for the non-fulfillment of the trust. The farm had, in 1807, been conveyed to Heatley, subject to the mortgage. The conduct of the defendant, in suffering the farm to be taken for the debt, and in buying a judgment against William Green, and seizing under it the personal estate in possession of Mrs. Green on that farm, which facts are specially set forth in the report, has strongly the appearance of a design to coerce the *cestui que trust* to some undue accommodation. I am accordingly of opinion that this exception ought to be allowed, so that the loss on the farm and the costs of the suit may not be chargeable to the trust estate.

MOSES v. MURGATROYD.

[1 JOHN. CH. 112.]

COLLATERAL SECURITY TO INDORSER.—Property assigned to the indorser of a promissory note by the maker, as security, is regarded as a trust for the benefit of the payee, though he have no knowledge of it at the time, and he may afterwards affirm and enforce such trust.

TRUSTEE'S DEATH, EFFECT ON TRUST.—Such trust is not discharged by the death of the indorser, but attaches to the property as long as it can be traced.

EVIDENCE TO SHOW OBJECT OF ASSIGNMENT.—Where an assignment, absolute on its face, is admitted to have been made as a general security, it may be shown by parol to have been intended to secure specific debts.

EQUITABLE ASSETS.—Surplus money arising from the sale of mortgaged premises, is considered as part of the real estate of the deceased mortgagor, and goes to the heirs and not to the administrator; and where the heirs are before the court, such surplus will be treated as equitable assets in their hands and distributed *pro rata* among the creditors.

EQUITY OF REDEMPTION AS ASSETS.—Where the creditors have a legal remedy against an equity of redemption, it is questionable whether, before sale, it could be deemed equitable assets.

DISPOSITION OF ASSETS IN EQUITY.—Courts of equity will follow the rules of law in disposing of legal assets, but will distribute equitable assets *pari passu* among all the creditors.

BILL by the plaintiffs, as payees of sundry notes, against the administrator and creditors of a deceased indorser, to compel the application upon said notes of the proceeds of certain goods assigned as security by the maker to the indorser. The bill stated in substance that on the sixteenth of December, 1805, one Samuel G. Ogden, being indebted to the plaintiffs, gave them certain promissory notes, payable to Samuel Murgatroyd, and indorsed by the latter; that, after making certain other assignments specified in the bill, the said Ogden, for the purpose of securing Murgatroyd against his indorsements of said notes, assigned to him goods of the value of twenty thousand dollars, on board the ship *Emperor*, from Hayti to New York; that, before the notes became due, Ogden became insolvent, and notice of the non-payment of the notes was given to Murgatroyd, who assured the plaintiffs that said notes should be paid out of the goods assigned to him by Ogden, as soon as the ship arrived; that the ship arrived in July, 1806; that Samuel Murgatroyd died intestate August 3, 1806; and Thomas Murgatroyd, defendant, was appointed administrator; that Ogden having made several assignments of goods on board the *Emperor*, in addition to that made to Samuel Murgatroyd, it was agreed by all the par-

ties concerned to submit the matter to arbitration; that on the hearing before the arbitrators, the administrator claimed the benefit of the assignment made to his intestate by Ogden to the full amount of the notes which he was holden to pay by reason of his intestate's indorsements; that on October 2, 1806, the arbitrators made an award, distributing the cargo among the claimants, upon which Thomas Murgatroyd, as administrator, received nineteen thousand dollars; that while the arbitration was pending, the plaintiffs made frequent application to the administrator for payment of their notes, but were always referred by him to the issue of the arbitration, he promising to pay the notes out of the proceeds of the portion of the cargo awarded to him; that the administrator had paid one of the notes, and that another had been paid by the intestate in his life-time, but the rest were still unpaid; that after the award, the administrator sold part of the cargo, but refused to pay the plaintiffs; that the widow of Samuel Murgatroyd afterwards intermarried with G. Storm, defendant, and the administrator confessed a judgment against his intestate to her as executrix of one Susannah Stevenson for fifty-seven thousand seven hundred and sixty-six dollars and thirteen cents, and pleaded that judgment and a deficiency of assets in bar of the plaintiffs demand; that this judgment was kept on foot *per fraudem*, etc.; that by agreement between the parties, the proceeds of the goods assigned by Ogden to Murgatroyd and still unappropriated, amounting to eleven thousand five hundred dollars, had been placed in the hands of Charles Wilkes, subject to the final decree in this cause; that Samuel Murgatroyd died seised of certain valuable real estate which came to his heirs, subject to a mortgage to one Lawrence; that the mortgage was afterwards foreclosed and the property sold by a master for seven thousand five hundred dollars, but no deed given; that the administrator having subsequently applied to the surrogate for an order for the sale of the real estate of the intestate on account of a deficiency of personal assets, the surrogate, with a view to secure the surplus moneys arising from the mortgaged premises, consented to the order of sale by the master. The bill concluded with a prayer for an account, and for the application of the proceeds of the goods, assigned as aforesaid, to the payment of their claims, and for the equal distribution among all the creditors, without preference to the said judgment, of the surplus moneys arising from the mortgaged premises.

Thomas Murgatroyd, in his answer, admitted the making and

indorsement of the notes, notice of non-payment, and the assignment of February 12, 1806, but denied that said assignment was intended as a spécial security against the notes in question, alleging that it was a general security against all liabilities incurred by the intestate for Ogden. He denied also that the intestate ever admitted said assignment to be a specific security against the indorsements. He admitted the award of the arbitrators, as alleged in the bill, but alleged that he claimed before the arbitrators to be allowed, under that and certain other assignments, for all the responsibilities incurred by his intestate for Ogden, amounting to thirty-one thousand two hundred and seventy-six dollars and fifty cents, and that he did not make any claim on account of the notes, any more than for any other item. He admitted the receipt of sixteen thousand two hundred and seventy dollars and fifty-five cents, under the award, but denied that he promised to pay the notes out of the proceeds. He averred that he refused to pay the notes out of the money, because he had certain other demands against Ogden, for his intestate, which were entitled to priority. He denied also that the judgment confessed to Susan Storm was fraudulent, but claimed that the same was *bona fide*, for certain moneys belonging to the estate of Susannah Stevenson, which the intestate, as administrator with the will annexed, of said estate, had appropriated to his own use, Susan Storm being the devisee under the will of Mrs. Stevenson.

Garret Storm and Susan Storm, his wife, formerly Susan Murgatroyd, widow of the intestate, Charles Wilkes and William Lawrence, put in joint and several answers, in which the principal facts as stated in the answer of Thomas Murgatroyd were admitted. Samuel G. Ogden was examined as a witness, and testified in substance that the assignment in question was for the purpose of securing Samuel Murgatroyd against his indorsements of said notes, and that he always considered that the said Murgatroyd "understood and was impressed" that the assignment was a specific security against those indorsements. J. G. Bogart, another witness, testified that he applied to the administrator for payment of one of the notes, and that the latter promised to pay it out of the goods so assigned. J. Wilkes, the notary, who demanded payment of the notes from Samuel Murgatroyd, testified that Murgatroyd told him that they would be paid on the arrival of the ship, which had been assigned to him by Ogden as security for his indorsements. D. A. Ogden testified to similar admissions both by the intestate and by the administrator.

Harris and Hoffman, for the plaintiffs, cited 1 Equity Cas. Abr. 98, K. pl.; 5 Bac. Abr. Obligation (B.), 168; *Kip v. Bank of New York*, 10 Johns. 63; *Neilson v. Blight*, 1 Johns. Cas. 205; 3 Bac. Abr. 58: 1 Salk. 79.

Wells and Colden, for the defendants.

KENT, Chancellor. The plaintiffs found their claim to the proceeds of the cargo, assigned by Ogden to S. Murgatroyd, on the twelfth of February, 1806, as being property held by the intestate in trust for the payment of their notes. If this be once conceded or ascertained as a matter of fact, the conclusion follows, of course, that the proceeds were not assets in the hands of Thomas Murgatroyd, the administrator, for the general creditors of his intestate, but they existed in his hands subject to the trust. The cases of *Deering v. Torrington*, 1 Salk. 79, pl. 1, and of *Kip v. The Bank of New York*, 10 Johns. 63, show that property held in trust does not pass to the representatives of the trustee discharged of the trust, but if it can be traced and distinguished, it shall enure to the benefit of the *cestui que trust*.

The assignment to Samuel Murgatroyd was absolute on the face of it; but it is admitted by the answer of the administrator, and supported by all the proof in the cause, that the assignment was made and taken by him as a security or indemnity merely; this fact being admitted, the party interested has a right to go into parol proof to explain the extent and object of the security. The admission of parol proof to show the intent becomes indispensable. The defendant (the administrator), in his answer, admits the assignment to be different from what it purports to be. It does not, therefore, truly express the intent of the parties, and parol evidence is then clearly admissible to show that intent. The deed was false on the face of it, by the admission in the answer, but that admission does not go to impeach the general fairness of the transaction; the difference between the deed as expressed and the deed as intended, may have arisen from mistake, or ignorance or accident; and it becomes necessary, in order to attain justice, that the court should let in parol proof to discover, and carry into effect the real intention of the parties in creating the security.

I have no doubt, then, of the competency of the parol proof in this case; and the weight of that proof goes to establish the fact for which the plaintiffs contend, that the assignment was made to indemnify S. Murgatroyd against the indorsement of

the notes in question. This appears from the evidence of Ogden, who made the assignment, and who testifies that he made it for that specific purpose, and for no other; and that he always considered that S. Murgatroyd, the assignee, so understood it. This appears also from the testimony of J. G. Bogart and of D. A. Ogden, who state, that they understood the same from the administrator, Thomas Murgatroyd; and it further appears from the evidence of Wilkes, that when he demanded payment of the notes of the intestate, he admitted in respect to the ship, an assignment to him by Ogden, as security for his indorsements. We have, then, a very full and explicit admission of the fact from all the parties concerned; from Ogden, who made the assignment; from Samuel Murgatroyd, the assignee; and from Thomas Murgatroyd, his administrator, and one of the defendants.

I shall then consider this fact as well made out, viz: that the assignment of the twelfth of February, 1806, though absolute on the face of it, was intended by the parties to it to be a security only to the intestate for his indorsement of the notes in question. This being the case, the plaintiffs, as holders of the notes, are entitled to the benefit of this collateral security, given by their principal debtor to his surety; and the cause of *Maure v. Harrison*, 1 Eq. Ab. 93, K. 5 Mich. 1692, is directly to this point. These collateral securities are, in fact, trusts created for the better protection of the debt; and it is the duty of this court to see that they fulfill the design. And whether the plaintiffs were apprised at the time of the creation of this security is not material. The trust was created for their benefit, or for the better security of their debt; and when it came to their knowledge, they were entitled to affirm the trust, and to enforce its performance. This was the principle assumed in the case of *Neilson v. Blight*, 1 John. Cas. 205. The plaintiffs are, accordingly, entitled to the exclusive appropriation of eleven thousand one hundred and fifty dollars and fifty cents in the hands of Charles Wilkes, with the interest thereon, towards the payment of their notes.

The next question is, whether the surplus moneys now in this court, and arising on the sale of the lands mortgaged to Lawrence, shall go to the administrator for distribution, when they will be absorbed by the judgment confessed, or whether they shall be distributed under the direction of this court, *pro rata*, among all the creditors as equitable assets. The administrator is not, as such, entitled to this surplus; it is part of the real

estate and goes to the heirs, and would be assets in their hands. The heirs appear to be infants, and their mother, Susan Storm, is before the court in the character of a creditor, in behalf of her children, and holding a judgment confessed by the administrator. I am inclined to consider the moneys in question as equitable assets. It was held, in *Plunket v. Penson*, 2 Atk. 290, that the equity of redemption of a mortgage, in fee, forfeited in the life-time of the mortgagor, was equitable and not legal assets; and the same doctrine was held by the master of the rolls in the case of *Sir Charles Cox's creditors*, 3 P. Wms. 341. But as the creditor has a remedy at law, with us, against an equity of redemption, it might be doubted whether it could be deemed equitable assets while unsold; but after it is converted into money, under the decree of this court, I think the money is to be treated as equitable assets; for the creditor must come here for relief, as the money is placed under the jurisdiction of the court. In *Freenoull v. Dedire*, 1 P. Wms. 429, it was said that where the estate descends to the heir, it is legal assets, but if the heir sell the land before suit, it then becomes equitable assets. The general doctrine is to encourage as much as possible the idea of equitable assets, because equality in the payment of debts is equity, and the rule of distribution in chancery is founded on principles of natural justice. Assets may be partly legal and partly equitable, and the court will in such case discriminate, and direct that such as are legal be applied in a course of administration, and such as are equitable be applied *pari passu*. This was done in *North v. Cox*, 3 P. Wms. 344, n. 3. In the distribution of legal assets this court follows the rule of law to prevent confusion in the administration of the estate; but whenever the assets are considered as equitable, then it is well and uniformly settled that they are to be distributed among all the creditors, *pro rata*, without giving preference: *Morris v. Bank of England*, 2 Cas. temp. T. 218.

I conclude, then, that the surplus moneys now in court are to be treated and distributed as equitable assets; and as no objection was made to the want of proper parties before the court, the decree must be entered accordingly: 1. That the plaintiffs are entitled to the eleven thousand one hundred and fifty dollars and fifty cents in the hands of Mr. Wilkes; and, 2. That the surplus moneys arising upon the sale of the mortgaged premises ought to be distributed as equitable assets, ratably among all the creditors.

Cited in the following cases on the point that security for the payment of a debt either to a surety or to the creditor himself, is a specific trust that equity will enforce: *Slee v. Manhattan Co.*, 1 Paige, 53; *Pratt v. Adams*, 7 Paige, 627 (citing many authorities); *Dias v. Brunel*, 24 Wend. 13; *Higgins v. Wright*, 43 Barb. 462. (But security given to a second indorser who has been discharged from liability will not avail the accommodation maker of a note.) *Wright v. Austin*, 56 Id. 13; *Marine Insurance Co. v. Jasnancy*, 3 Sandf. 257; *Bank of Metropolis v. Guttschlick*, 14 Pet. 31 (approving the doctrine that one for whose benefit a trust is created without his knowledge may have it enforced: *Sedam v. Williams*, 4 McLean, C. C. 54; *United States v. Sturges*, 1 Paine, C. C. 525; *Pierce v. Robinson*, 13 Cal. 121 (quoting the language of Chancellor Kent at length). The principal case is also cited, on the point that a trust follows the trust property as long as it can be traced, in *Graham v. Dickinson*, 3 Barb. Ch. 173; *Gilchrist v. Stevenson*, 9 Barb. 16; *Wood v. Dummer*, 3 Mason, 313; *Trecothick v. Austin*, 4 Id. 29; *Remnants in Court*, Olcott, 387; and upon the subject of the admissibility of parol evidence to explain the object of an assignment absolute on its face, the case is cited in *Averill v. Loucks*, 6 Barb. 24; *Cook v. Eaton*, 16 Barb. 439; and in *Pattison v. Hull*, 9 Cow. 754, where the court say: "*Moses v. Murgatroyd*, 1 Johns. Ch. 119, must have gone on the ground that there was a mistake, ignorance or accident in framing the deed, otherwise the case is anomalous and a departure from settled principles." The principal case is referred to upon the question of the disposition of the surplus under a mortgage where the sale takes place after the death of the mortgagor, in *Graham v. Dickinson*, 3 Barb. Ch. 173; *Sweezy v. Thayer*, 1 Duer, 304, and upon other points in *Griffith v. Beecher*, 10 Barb. 432, and *New Bedford Savings Institution v. Fairhaven Bank*, 9 Allen, 178.

BENEDIOT v. LYNCH.

[1 JOHN. CH. 370.]

SPECIFIC PERFORMANCE, DENIED.—Where the remedy is not mutual, or where only one party is bound, a bill for a specific performance of an agreement will not be sustained.

TIME ESSENTIAL IN CONTRACT.—Time may be made an essential part of an agreement; and in equity will be so regarded when the parties make it the essence of their contract. So, in a contract for the sale of land, where a party makes a default in payments, without any just excuse, or any acquiescence, or subsequent waiver by the other party, a court of equity will not relieve the party so in default, and will deny a specific performance of the contract, after a tender of the payments due has been made.

BILL for the specific performance of an agreement for the sale of land. On the twenty-eighth of March, 1810, the plaintiff contracted with the defendant, who signed the following agreement: "That the defendant agreed to sell to the plaintiff a piece of ground (described) containing thirty-nine acres, at fourteen dollars and fifty cents per acre; and upon the following

conditions being performed, to wit, that the plaintiff pay to the defendant two hundred and fifty dollars in one year, one third of the remainder in one year thereafter, one third in the next year, and the balance in the year following (1814), with interest annually on all the sums; and upon his complying with the payments, the defendant agreed to give a deed. If the plaintiff failed in the payments, or any of them, the agreement to be void."

The plaintiff took immediate possession, cleared eight acres, and built a house thereon; but was unable to make the payments agreed on. To induce the defendant to forbear suing for the purchase-money, the plaintiff subsequently agreed with the defendant to clear five acres in one year, and in consideration, the defendant promised to forbear during that time. The plaintiff had since tendered all the purchase-money, though it was not all due; but the defendant refused to accept, and brought ejectment. An injunction was prayed for, which was granted on the deposit of the amount of the purchase by the plaintiff.

The points at issue, and the questions raised are further stated in the opinion.

Gold, for plaintiff.

J. Lynch, for defendant.

KENT, Chancellor. I have considered this case with great attention, and I cannot discover any just principle arising out of the facts that will warrant a decree for a specific performance. The bill is founded on an agreement of the twenty-eighth March, 1810, signed by the defendant only, and by which he agreed to sell the plaintiff the land in question [here the agreement was recited]. Under this agreement, the plaintiff entered into possession, and made improvements, but he made no payments; and in October, 1813 (and which was about two years and a half after the first default), the defendant, considering the agreement as void or abandoned, sold the land to another person, and in February, 1814, the plaintiff filed his bill for a specific performance.

I need not stay to examine how far the objection of a want of mutuality is applicable to this contract, since the decision can be placed with more satisfaction upon the intrinsic merits of the case. But the point being stated by the counsel, I am unwilling to pass it by, without observing that it has been ruled in several cases, *Armiger v. Clarke*, Bunb. 111; *Bromley v.*

Jeffries, 2 Vern. 415, that a bill for specific performance will not be sustained, if the remedy be not mutual, or where one party only is bound by the agreement. This doctrine received a very clear illustration, and an explicit sanction in a late decision by Lord Redesdale, *Lawrenson v. Buller*, 1 Schoale & Lefroy, 13. Though there are other cases in which an agreement has not been deemed within the statute of frauds, and specific performance has been decreed, when the contract was signed only by the party sought to be charged: *Seton v. Slade*, 7 Ves. 265; *Fowle v. Freeman*, 9 Ves. 351; yet the contrary opinion appears, from the most recent decisions, to be now prevailing: *Champion v. Plummer*, 5 Esp. N. P. 240; *Huddleston v. Briscoe*, 11 Ves. 592.

There was an express stipulation in this contract that if the plaintiff failed in either of his payments, the agreement was to be void. The first question that naturally presents itself is, whether the time was not here made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment in 1811. Lord Thurlow is said to have intimated in *Gregson v. Riddle* (cited in 7 Ves. 268) that time could not be made of the essence of the contract, even by a positive stipulation of the parties, but there was no decision on that point; and in other and later cases, *Lloyd v. Collet*, 4 Bro. 469; 4 Ves. 589 n; *Seton v. Slade*, 7 Ves. 265, it has been admitted that the parties may make the time of the essence of the agreement, so that if there be a default at the day without any just excuse, and without any waiver afterwards, the court will not interfere to help the party in default. The case is not analogous to that of a mortgage, where the only object of the security is the payment of the money, and not the transfer of the estate; and it seems to be conducive to the preservation of good faith, and the rights of parties, that if a contract of sale is expressly declared to be vacated on non-performance by a given day, that the courts should not interfere, as of course, to annul such a provision. The opinion of Lord Loughborough, in *Lloyd v. Collet*, contains a strong and decisive argument upon this point. "There is nothing," he observes, "of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should be certainly known when a man is bound, and when not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say

the time is so essential, that, in no case, in which the day has been by any means suffered to elapse, the court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, etc., might induce the court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all; and that it is not in the power of the parties to contract, that, if the agreement is not executed at a particular time, they shall be at liberty to rescind it. In most of the cases there have been steps taken." "I want a case," he says, "to prove that where nothing has been done by the parties, this court will hold, in a contract of buying and selling, a rule that the time is not an essential part of the contract. Here no step had been taken, from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity." It would be impossible for me to add to the perspicuity and energy of this reasoning; and the lord chancellor, in that case, held that as the vendor had omitted to complete a purchase for six months, being all the time in default, he was considered as having abandoned the contract; and he said there was no case where no step had been taken by the one party, and the other had immediately, when the time had elapsed, refused to perform the agreement, that a performance had been decreed.

It may then be laid down as an acknowledged rule in courts of equity, and so the rule is considered in elementary treatises on this subject: Newland on Contracts, 242; Sugden on Vendors, 268; that where a party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay; and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. The rule appears to be founded on the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that seems too much to prevail, and of which the facts in the present case furnish an example, that a party may be utterly regardless of his stipulated payments, and that a court of chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character

of this court. It would be against all my impressions of the principles of equity to help those who show no equitable title to relief.

It may be useful, however, before we come to apply the rules of the court to the facts in this case, to look more particularly into the cases which have given countenance to this idea. The case of *Vernon v. Stephens*, 2 P. Wms. 66, was a bill brought by a vendee for a specific performance after repeated defaults; but in that case different payments had been made and accepted, and further time had been given after each default, by agreement in writing; and the final default after the last agreement, arose from the death of the original vendor, and a neglect for some time to take out letters of administration, so that the last default was reasonably accounted for; and the case therefore proves nothing in favor of a party in default, without excuse, and without a waiver from the opposite party. The case of *Gibson v. Patterson*, 1 Atk. 12, in which Lord Hardwicke was supposed to have held that non-performance at the time was very immaterial, is proved to be most inaccurately reported, and that Lord Hardwicke made no such deduction: 4 Ves. 689, 690, n.; 4 Bro. 497; 13 Ves. 228, 9. And, indeed, in another case, 1 Ves. 450, Lord Hardwicke lays down the rule on this subject, when he says, that it is the business of this court to relieve against lapse of time in the performance of an agreement, and especially where the non-performance has not arisen by default of the party seeking to have a specific performance. So it was held in the case of *Hayes v. Caryl*, as early as 1792, 5 Viner, 538, pl. 18, that where one person has trifled, or shown a backwardness in performing his part of the agreement, equity will not decree a specific performance in his favor, especially if circumstances are altered.

I do not perceive, therefore, that in the more ancient cases there is no real ground for the opinion that the time stipulated for the performance of a contract is of no moment in this court; and I am at a loss to conceive how such an extravagant proposition could ever have gained currency. It is certainly, and very justly, exploded in the modern decisions. In *Pincke v. Curtis*, 4 Bro. 329, the suit was by the vendor for a specific performance, and the plaintiff had failed, for near a month after the specified day, to complete his title, but it appeared that the delay arose because the title depended upon the event of a chancery suit, and the vendee was apprized of this cause of the delay and acquiesced in it, and was willing to go on with the

purchase, and a performance was consequently decreed. The case is not well reported (see the note to Sugden on Vendors, 278), but these were the true grounds of the decree, and the chancellor said that if the vendee had called for the deposit at the end of the time limited for completing the purchase, the court would not have compelled him. The case of *Fordyce v. Ford*, 4 Bro. 494, is to the same effect. There was a delay short of two months beyond the stipulated time; but when the abstract of the title was delivered to the vendee he made no objection, but acquiesced; and if he had not, said Lord Alvanley, I should not have decreed a performance; and the rule now is, that if either party is guilty of gross negligence, the court will not lend its aid to complete the contract; and he hoped, he said, that it would not be understood from that decision that a man is to enter into a contract, and then to think that he has his own time to perform it.

These were cases of delay on the part of the vendor, but the rule applies equally to both parties, and the purchaser who neglects his part of the engagement will be left to his remedy at law, if he has any, though he may have paid part of the purchase-money. He cannot be suffered to lie by and speculate on the rise of the estate. The cases of *Spurrier v. Hancock* and of *Harrington v. Wheeler*, 4 Ves. 657, 686, were on bills filed by the purchaser for a specific performance, and in the latter case he had paid part of the purchase-money; but the bill in each case was dismissed on account of his *laches* and trifling and unreasonable delay. The observation of the master of the rolls in *Milward v. Thanet*, 5 Ves. 720, n., is very emphatical on the subject before us. He observed that Lord Kenyon was the first who set himself against the idea that had prevailed, that when an agreement was entered into, either party might come at any time; and that it was then perfectly known that a party cannot call upon a court of equity for a specific performance, unless he had shown himself ready, desirous, prompt and eager. *Guest v. Hornfray*, 5 Ves. 818, is another strong case in point. Specific performance was there refused on account of the *laches* of the plaintiff, who was the vendor. Here the purchaser had been put into possession when the contract was made, but the question was, as the court said, whether the plaintiff had done enough to show he took all the pains he could to be ready to carry the agreement into effect; and as it did not appear that he had done all he ought to have done, and though the delay was but three months, and the plaintiff had met with an

unwilling purchaser, who meant to get rid of the contract if he could, the bill was dismissed. If, on the other hand, the circumstances of the case and the conduct of the opposite party will afford ground for a just inference that he has acquiesced in the delay and waived the default, the non-performance at the stipulated time will be overlooked, and will be deemed to have been waived by the other party. The cases of *Seton v. Slade*, 7 Ves. 265; of *Smith v. Burnam*, 2 Anst. 527, and of *Paine v. Meller*, 6 Ves. 849, as well as many others which might be cited, turn upon this distinction. From the review which I have taken of the cases, the general principle appears to be perfectly established, that time is a circumstance of decisive importance in these contracts, but it may be waived by the conduct of the party; that it is incumbent to the plaintiff calling for a specific performance to show that he has used due diligence, or if not, that his negligence arose from some just cause, or has been acquiesced in; and it is not necessary for the party resisting the performance to show any particular injury or inconvenience. It is sufficient if he has not acquiesced in the negligence of the plaintiff, but considered it as releasing him.

These principles appear to me to be founded in natural justice, and to be equally conducive to public convenience and to the maintenance of public morals. I shall cite only one more case, that of *Alley v. Deschamps*, 13 Ves. 224, which was a late decision by Lord Erskine, and which in all the circumstances of the case, is very analogous to the one now before me. It was a bill in behalf of a purchaser for a specific performance; he was to pay by installments, and was put into possession upon the execution of the agreement. He afterwards became embarrassed, and unable to comply with the terms, though he had paid one hundred pounds in part satisfaction of the contract. The bill was filed before the last installment was due. The defendant, in his answer, said that the contract was considered by him as relinquished, and that the plaintiff was suffered to continue in possession as tenant. The lord chancellor said, he should take it that the agreement was not abandoned, and that the plaintiff did not, by his own act, consent to rescind it; but he said that under the circumstances of the case, there was not a color for decreeing a specific performance; and that his judgment proceeded upon a plain principle that a bill for specific performance would not be endured under such circumstances; that it would be dangerous to permit parties to lie by, with a view to see whether the contract would prove a gaining or los-

ing bargain, and according to the event, either to abandon it, or considering the lapse of time as nothing, to claim a specific performance; and here nothing had been done, except the one small payment towards performance when the purchaser became bankrupt, nor afterwards, until the premises, by a subsequent event, proved to be much more valuable than they were at the time the contract took place. The bill was dismissed with costs. It is impossible not to be struck with the close analogy between that and the case now under consideration. Here, the purchaser has paid nothing, but suffered defaults to accumulate year after year; and if he had forgotten that he was under any obligation to pay; and if the land had not risen in value within the last two or three years, so as to render the purchases an object of speculation, there is no reason to believe that the plaintiff would ever have attempted to raise the money out of the benevolence of his friends. I think that within the reason and spirit of all the cases, here was a gross negligence on the part of the plaintiff that takes away his claim to assistance.

The circumstances attending the new agreement between the parties, of the fourteenth March, 1812, prove conclusively that the original contract was expressly abandoned. . This agreement, by which the plaintiff contracted with the defendant to clear off and fence five acres within one year, does not, of itself, import that the original agreement was, or was not, abandoned; and parol evidence is admissible to explain that fact, which is collateral to the operation of the instrument. Such evidence would not vary or qualify the effect of it; it would only go to repel any presumption, or rebut any equity, which might be attempted to be induced from the instrument itself. But there is another ground on which the parol evidence, to which I allude, is competent. This agreement is stated to have been given in consideration of one dollar, *and for various other considerations*, and it was admitted by Lord Hardwicke, in the case of *Pencock v. Monk*, 1 Ves. 127, that if a deed, after mentioning any particular consideration, adds, *and for other considerations*, you may enter into proof of these other considerations; and the same doctrine was alluded to in the case of *Maigley v. Hauer*, 7 Johns. 341. There is no repugnancy in such a case, between the proof and the deed. It is then proved in this case, by two witnesses, that when the agreement was made, the defendant, by his agent, stated to the plaintiff that, as he had failed in his contract, the plaintiff must sell the land to some other person;

that the plaintiff admitted he could not pay for the land, and that if the defendant would permit him to remain on the land for one year, he would then abandon the same, and give up the possession; and as a consideration for continuing on the land for the year, he would clear and fence five acres; and that the writing was given for that purpose. In addition to this testimony, we have that of Josiah Hills, who states that in September, 1813, he went with Samuel Hills to the plaintiff, and the plaintiff then told him that he could not pay for the land, nor complete his purchase, and that he expected to leave the land in the course of the next winter, and that he was willing to give up the possession, and even offered to sell his claim under the contract for ten dollars, though without warranting a deed. This was the person who, a few days after, purchased the land of the defendant, and paid most of the consideration money. No doubt this purchase was greatly induced by that conversation; and the plaintiff, after such continued and gross neglect in not complying with his original contract, and after such express abandonment of the purchase, and after such admissions to a subsequent purchaser, comes into this court without any color of equity to ask for a specific performance. I shall accordingly dissolve the injunction, and dismiss the bill with costs.

Decree accordingly.

The courts of the other states have extensively noticed this case, on the point as to when time should be regarded in equity as the essence of the contract; and the rule as to this, in the language of Chancellor Kent, is very frequently quoted. See, citing and approving the principle as to time being essential: *Delager v. Hazard*, 16 Ala. 202; *Atkins v. Bison*, 25 Ark. 140; *Green v. Covilland*, 10 Cal. 327; *Weber v. Marshall*, 19 Id. 459; *Smith v. Brown*, 10 Ill. 314; *Kemp v. Humpreys*, 13 Id. 576; *Emmons v. Kiger*, 23 Ind. 488; *Armstrong v. Pierson*, 5 Iowa, 324; *Henry v. Grady*, 5 B. Mon. 451; *Hall v. Noble*, 40 Me. 473; *Bomier v. Caldwell*, 8 Mich. 469; *Yoss v. DeFreudenrich*, 6 Minn. 106; *Bodine v. Glading*, 21 Pa. St. 54; *Westerman v. Means*, 12 Id. 100; *Younger v. Welch*, 22 Tex. 427; *Bouten v. Scheffen*, 21 Gratt. 491; *Cox v. Cox*, 26 Id. 491.

MUTUALITY OF CONTRACT.—The doctrine asserted here as to the necessity of a mutuality in the contract, is not now followed generally. On this point, Brown, on the Statute of Frauds, sec. 366, says: "It has been seriously doubted by a very eminent judge, whether an agreement, of which the memorandum was signed by one party only, should be enforced against the other in a court of equity; upon the ground that, if so, it would follow that the court would decree a specific performance when the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him, he would be liable to the performance; and yet, if advantageous to him, he could not compel a performance. Notwithstanding this doubt, how-

ever, the rule is firmly settled, that in equity for obtaining a specific execution, as well as in law for recovering damages, the signature of the party who makes the engagement is all that the statute requires:" See the note to *Merritt v. Clason*, *ante*, 286.

In *Marqueze v. Caldwell*, 48 Miss. 23, it is held, that specific performance will be decreed against the party who signed the contract, although the other party did not sign, and although there is no mutuality of remedies between the parties. The doctrine of the principal case on this point was considered; and it was shown not to be in harmony with the authorities, and departed from even by Kent himself subsequently. The court say: "Chancellor Kent, in *Clason v. Bailey*, 14 Johns., after a very thorough review of the English cases, came to the conclusion that the point is too well settled to be now questioned." In *Parkhurst v. VanCortlandt*, 1 Johns. Ch. 282, and *Benedict v. Lynch*, Id. 370, the same learned judge had intimated a contrary opinion, because of the want of mutuality in the agreement. In his judgment in *Clason v. Bailey*, he refers to the former inclination of his mind, but adds, "notwithstanding this objection," the point is concluded on authority. Subsequent cases in New York treat the question as at rest: *McCrea v. Purnmort*, 16 Wend. 465; *Fenly v. Stewart*, 5 Sandf. 105; where the court remark upon the statute that it "does not require that the contract shall be signed by both parties, but by the party to be charged thereby; that is, the defendant to the suit. To the same point are the cases of *Barton v. Gray*, 3 Maine, 409; *Douglas v. Spear*, 2 Nott & McCord, 209; *Cosach v. Descondes*, 1 McCord, 425; *Penniman v. Hartshorn*, 13 Mass. 87; *Lowry v. McHaffey*, 10 Watts, 387; *Ives v. Hazard*, 4 R. I. 14; *Sans v. Tripp*, 10 Rich. (S. C.) 447; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Shirly v. Shirly*, 7 Blackf. 454. An examination into the authorities in this country and in England, discovers that Lord Redesdale made a single departure from the current of authority, which brought Lord Eldon to pause and express a doubt. Lord Redesdale was dissented from or overruled by his immediate successor. In this country, Chancellor Kent was inclined to follow the great Irish chancellor, subsequently abandoned his first opinion, and admitted that the question was concluded by the weight and uniformity of authority."

"In *Schroeder v. Gemeinder*, 10 Nev. 355, also, the authority of the principal case in this point is denied. That was a case of a lease containing a covenant on the part of the lessors that the lessees should have the first privilege of purchasing the premises at a stipulated price. The lessees having within the time of their occupation of the premises tendered the agreed price and demanded a conveyance, the lessors refused it, and an action was commenced by the lessees to compel the specific performance of the covenant. Among other defenses set up was that of want of mutuality in the contract; and in passing upon this point the court say: 'Several authorities have been cited to the effect that when the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other.' The case of *Parkhurst v. Van Cortlandt*, was reversed on appeal in the court of errors: 14 Johns. 15. Some of the other cases have but little applicability to the facts of this case, and several of them have been reviewed and expressly overruled by the decisions in other states. There are many exceptions to the general rule stated in said cases, and without attempting to review the authorities relied upon by respondent, we think it may now be considered as well settled by all, or nearly all, the modern authorities, that a court of equity, in actions for the specific performance of optional contracts and covenants to lease or convey lands, will enforce the covenant, although the remedy is not mutual, provided it is shown to have been made on a fair

consideration, and where it forms part of a contract, lease or agreement that may be the true consideration for it. * * * It may be well to state in this connection that Chancellor Kent, who delivered the opinions in *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 275, in 1814, and in *Benedict v. Lynch*, Id. 370, in 1815 (both cited and relied upon by respondent's counsel), afterwards, in 1817, in *Olson v. Bailey*, in passing upon this question, after referring to the observations of Lord Chancellor Redesdale, in *Lawrence v. Butler*, 1 Sch. & Lef. 13 (also cited by respondent), who thought that the contract ought to be mutual to be binding, and that if one party could not enforce it, the other ought not, said: 'I have thought, and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands to be enforced in equity should be mutually binding, and that the one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. * * * But notwithstanding this objection, it appears from the review of the cases that the point is too well settled to be now questioned.'"

CHEESEBROUGH v. MILLARD.

[1 Johns. Ch. 409.]

RELATIVE RIGHT OF LIENORS.—A creditor who has a lien upon two funds will be compelled, in favor of a subsequent lienor having a claim upon one of the funds only, to satisfy his debt from the other fund.

SUBROGATION.—The doctrine of subrogation is founded on principles of equity, and not on contract. Therefore, where a creditor having a lien on two pieces of land, releases one of them, without any notice of the claim of another creditor, whose lien extends only to the other, the former is not to be prejudiced by his inability to subrogate the latter to his lien on the property which has been released.

BASIS OF CONTRIBUTION.—Purchases at a sheriff's sale of several parcels of land must contribute to the redemption of a prior mortgage of the whole, in proportion to the actual relative values at the time of sale, in preference to the prices at which they were sold.

RECORD OF SECOND MORTGAGE.—The recording of a second mortgage is not constructive notice to the mortgagee under a first recorded mortgage.

BILL in equity. It appeared that one Smith, on the twenty-second December, 1803, executed a bond to the defendants, Ambrose Millard and B. Millard, for the payment of three thousand five hundred dollars in two installments, with interest, and as security executed a mortgage on certain mill property. Subsequently, on the seventeenth March, 1804, Smith, as collateral security for the first payment, and interest on the bond, executed a second mortgage on six lots, the subject of the present suit. This second mortgage referred to the bond, and stated it was given to secure payment of the first installment and interest, but made no mention whatever of the first mortgage. By indorsements on the bonds and mortgages, it ap-

peared that on the eighth of June, 1808, one Bacon, and on the twenty-sixth October, 1808, one Marvin, also became interested in the bond and securities; and by some arrangement Marvin was at the time considered as the owner of the first mortgage, and Ambrose Millard as owner of the second mortgage. On the twelfth January, 1809, by agreement between all the parties concerned, Smith was credited on his bond with payment of the second installment, and Marvin discharged the first mortgage; the first installment declared to be unpaid, remained secured by the second mortgage. It was supposed that the object of these transactions was to accommodate third persons who were interested in the mill property. Before the latter arrangement, J. and M. Van Shaick, co-defendants, had, on the thirteenth June, 1808, obtained a judgment against Smith, the mortgagor, which bound his equity of redemption in the second mortgage. An execution on this judgment was issued, and the lots included in the second mortgage were sold in January, 1810. The plaintiffs purchased two of the lots, knowing of the second mortgage, and of the discharge of the first. The other four were purchased by the Van Shaicks.

On the seventh December, 1810, one Douw, as trustee of the joint interest of himself and the Van Shaicks, obtained an assignment of the bond and the second mortgage from Ambrose Millard, to be protected against it, and proceeded to foreclose by advertising the sale at auction, under a power contained in the mortgage. The plaintiffs, the purchasers of the two lots, offered to contribute to the discharge of the second mortgage, according to the relative value of those lots, estimated by the sale under execution; but this offer was rejected. Thereupon, the plaintiffs filed their bill to be discharged from the second mortgage altogether, on the ground of fraud, etc., or to be relieved, on contributing ratably to the payment of the amount secured by the mortgage, and prayed for an injunction on the suit of Douw. Millard and others filed their bill afterwards to compel the plaintiffs in the first suit to redeem the mortgage, by contributing according to the actual relative value of the lots, or that the equity of redemption, as to those two lots, be foreclosed.

Woodworth, for plaintiffs.

Henry, contra.

KENT, Chancellor. The controversy resolves itself into these two questions: 1. Whether Cheesebrough and others are bound

to contribute towards the payment of the mortgage? 2. If they are, then what is to be the rule of contribution?

1. The weight of testimony is decisive in proof of the agreement, and understanding of all the parties to the bond and mortgages, that the payment of one thousand nine hundred and two dollars and seventy-eight cents, for which the receipt was given by Bacon, and the certificate of discharge, by Marvin, was to be applied to the discharge of the second, and not of the first, installment. This appears from the depositions of Bacon, Cook, and G. Van Schoonhoven, and from the certificate itself. I see no room to doubt of the intention of the parties, or of the validity of the arrangement. It was one which they were competent to make, and it was evidently made in good faith, and for their mutual convenience, without any intention injurious to others. The first mortgage was, therefore, absolutely discharged, and the second mortgage remained binding as a security, for the first installment, and it cannot now be questioned, or denied, to be a subsisting incumbrance, unless the purchaser, under the judgment, can show some equitable right, arising out of the circumstances of the case to be protected from its operation.

I admit as a principle of equity, that if a creditor has a lien on two different parcels of land, and another creditor has a lien of a younger date on one of those parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled, either to have the prior creditor thrown upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford him. This is a rule founded in natural justice, and I believe it is recognized in every cultivated system of jurisprudence. In the English law, it is an ordinary case, that if a party has two funds, he shall not, by his election, disappoint another who has one fund only, but the latter shall stand in the place of the former, or compel the former to resort to that fund, which can be affected by him only: *Sagitary v. Hyde*, 1 Vern. 455; *Mills v. Eden*, 10 Mod. 488; *Attorney-general v. Tyndall*, Amb. 614; *Aldrich v. Cooper*, 8 Ves. 388, 391; *Trinimer v. Rayne*, 9 Ves. 209. The party liable to be affected by this election, is usually protected by means of substitution. Thus, for instance, if the creditor to a bond exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he was a purchaser, either against the principal debtor or the co-sureties. This doctrine of substitution, which is familiar to the civil law,

Dig. 46, 1, 17 and 36; Voet, h. t. s. 27, 29, 30, and the law of those countries in which that system essentially prevails, Pothier, *Traité des Oblig.* n. 275, 280, 427, 519, 520, 522; Kaim's Eq. vol. 1, 122, 124; Hub. Praelec. Inst. lib. 3 tit. 21 n. 8, is equally well known in the English chancery.

In the case *Ex parte Crisp*, 1 Atk. 133, Lord Hardwicke said that where the surety paid off a debt, he was entitled to have, from the creditor, an assignment of the security, to enable him to obtain satisfaction for what he had paid beyond his proportion; and in *Morgan v. Seymour*, 1 Ch. Rep. 64, the court decreed that the creditor should assign over his bond to the two sureties, to enable them to help themselves against the principal debtor. To apply, then, the general principle to the present case, if the first mortgage had not been discharged, and the mortgagee had chosen to enforce the payment of the whole first installment from the lands covered by the second mortgage, to the loss, perhaps, of the lien of the judgment-creditor, by the consumption of the subject, that creditor, and probably the purchaser under the judgment, would have been entitled either to have turned him from the path he had taken, or to the aid of the first mortgage, to recover a proportional indemnity from the other lands covered by that mortgage. But, in this case, the first mortgage is canceled, and no such recourse can be had; and the question which arises is, whether the second mortgage can, in such case, be enforced? It appears, from some of the authorities to which I have referred, to be well settled that if the creditor has put it out of his power to make the assignment, he is, in many cases, to be precluded from so much of his demand as the surety or younger creditor might have procured, if the cession could have been made. *Repellitur exceptione cedendarum actionum*. And if the judgment-creditor in this case had given notice to the owner of the first mortgage, before the arrangement and discharge took place, of the equity which he claimed and expected, I might probably have been inclined to have stayed, to a certain extent, the operation of the second mortgage. But there is no evidence or even ground for presumption, that either Marvin or Millard, the owners of the mortgages, knew of the existence of the judgment when the arrangement was made and carried into effect. They were not bound to search for the judgment, and the record was no constructive notice to them; and as this rule of substitution rests on the basis of mere equity and benevolence, the creditor who has thus disabled himself from making it, is

not to be injured thereby, provided he acted without knowledge of the other's rights, and with good faith and just intention, which is all that equity in such case requires: Pothier, *Traite des Oblig.*, No. 520. "The other debtors and sureties," to adopt the observations of Pothier, "might as well as the creditor have taken care of the right of hypothecation which he has lost; they might summon him to interrupt, at their risk, the third purchasers, or to oppose the decrees. It is only in the case in which they may have put the creditor, in default, that they may complain that he had lost his hypothecation."

Nor have Cheesebrough and others any peculiar equity on their part to entitle them to set up the discharge of the first mortgage as an equitable bar to contribution. They came in as purchasers at the sheriff's sale long after the discharge had taken place, and with notice of that fact, and of the existence of the second mortgage. They were accordingly duly apprized of the condition of the subject which they purchased; and they had even taken the advice of counsel, whether the second mortgage was a valid and subsisting incumbrance. And, before the commencement of their suit, they had admitted its validity by offering to contribute to its discharge, and actually tendering in money what they deemed their just proportion. Under all these circumstances, they have no equity as against the second mortgage, and I am of opinion, on every view of the point, that the mortgage is not discharged, and that the owner of it is entitled to have it satisfied out of the lots, which it originally covered.

2. The rule of contribution between the parties, as owners of the different lots, must be the actual relative value of the lots, and this value is to be ascertained by the testimony of witnesses, in preference to estimating it by the price at which they were respectively purchased at the sheriff's sale. Such sales are by no means a sure and certain test of value, and I see no good reason why we should depart from the better standard, and adopt this precarious one, which is liable to constant variation, and must depend, in a great measure upon contingencies. The object of the principle of contribution is equality in the support of a common burden, and the law upon this point, as Lord Coke observed in *Sir Wm. Harbert's case*, is "grounded upon great equity," and equity has a regard to the true value, and not one depending upon contingency and speculation. The rumor prevailing at the sale, that the lots might be affected by some voluntary conveyances of the original mortgagor, has

been urged as a reason for taking, in this instance, the auction price; but I do not perceive the force of the argument. The rumor, it is to be presumed, affected in equal proportion the price of all the lots, and leaves the general rule just as applicable as before. [Here certain data were given for calculating the relative value of the lots.]

Decree accordingly.

This case is regarded as high authority on the doctrine of contribution and subrogation. In his work on Equity Jurisprudence, Story extensively notices it, as laying down the true principles on these heads. In the first volume, in a note to section 469, he says: "Mr. Chancellor Kent has, in several of his judgments, treated the subject of contribution, and insisted strongly that it is not necessarily founded upon contract, but upon principles of natural justice, independent of contract: See *Chesebrough v. Millard*, 1 Johns. Ch. 409; *Stevens v. Cooper*, 1 Id. 425; *Campbell v. Mesier*, 4 Id. 334. In this opinion, he is not only fully borne out by the doctrines of the English law, but by the Roman and foreign law, which he has with his usual ability and learning commented upon." This is the accepted doctrine in the New York courts on the authority of this case: *Ingalls v. Stockman*, 10 N. Y. 188. Referring to the principal case as authority, Folger, J., in *Colgrove v. Tallman*, 67 N. Y. 98, says that the rule is that a creditor having a lien upon two funds will be forced in favor of an after lienor, having a claim upon one of the funds only, to seek his debt from the other fund.

In *Morgan v. Hinman*, 13 N. Y. 184, the case is cited as authority showing that a first mortgagee is not affected with notice of the record of a second mortgage; and to the same effect it is cited in Massachusetts in *George v. Wood*, 9 Allen, 83.

STEVENS v. COOPER.

[1 JOHN. CH. 425.]

PAROL EVIDENCE TO VARY WRITING.—In equity, as well as law, parol evidence is inadmissible to contradict or substantially to vary the import of a written agreement where no fraud, mistake or surprise in its execution is alleged.

RELEASE OF PART OF MORTGAGED PREMISES.—One having a mortgage on six separate parcels of land, released four of them, one of the other two having been, with his knowledge, previously sold by the mortgagor, and it was held that the two parcels not released were subject only to their ratable proportion of the mortgage debt according to the value of all the parcels at the date of the mortgage.

CONTRIBUTION.—Where land is charged with a burden, each part should bear its just proportion, and equity will not permit the creditor, by any assignment or other act to deprive co-debtors or owners of the land of their right of contribution against each other.

BILL by owners of a part of the land subject to a mortgage to compel the mortgagee to accept a ratable proportion of the

mortgage debt. The facts aver: On the sixteenth of March, 1795, one John Richardson made a bond and mortgage to William Cooper, defendant, upon lot No. 72, in Sempronius, and lot No. 82 in Camillus, together with four other lots, respectively, numbered 29, 46, 88 and 98. Subsequently, Richardson sold lot No. 82 to William Stevens, who, after making valuable improvements, died in March, 1801, leaving the plaintiffs his heirs at law.

Cooper was informed of this sale, and of the terms of it, at the time it was made. After the sale to Stevens, Richardson also sold lots 29, 46, 88 and 98, and obtained from Cooper a release of said lots from the mortgage on giving a bond and warrant of attorney to confess judgment thereon for the value of the lots at two dollars per acre, the release reserving the lien of the mortgage in full force against lots 72 and 82. The mortgage was afterwards assigned in part to Abijah Hammond, defendant, who had notice of the sale and release of the four lots. In July, 1801, the plaintiffs paid to Cooper six hundred dollars, for which Cooper gave a receipt, stating that it was "for interest due on lot 82, in Camillus, mortgaged to him by Richardson, and since assigned in part to A. Hammond." As a part of their case the plaintiffs pleaded and relied upon a parol agreement between Richardson and Cooper, at the time of the mortgage, that on a sale of any of the lots by Richardson and payment by the purchaser to Cooper of two dollars per acre, with interest, such lots should be released from the mortgage, and claimed that the release above-mentioned, and also the payment of six hundred dollars by the plaintiff to Cooper, were in pursuance of this agreement. The defendants, Cooper and Hammond, denied this parol agreement, and the evidence concerning it was contradictory.

The defendants filed a cross-bill, praying that the plaintiffs be decreed to pay the amount due on the mortgage, or that lots 72 and 82 be sold, etc.

Van Vechten, for the plaintiffs, contended that the parol agreement was valid, as against Cooper and Hammond, and moreover, that the mortgage was a mere personal interest, citing *Newland on Cont.* 197; *Rob. on Frauds*, 274; 3 *Johns. Cas.* 322; also, that Hammond took the mortgage, subject to the equities between the original parties, citing *Sugden's Law of Vend.* 467; 2 *Johns.* 595; 4 *Ves. jun.* 118, 289; 9 *Id.* 264; 2 *Fonbl.* 158, sec. 4; and that Cooper having notice of the sale to Stevens, had no right to release the four lots and leave the

whole mortgage chargeable on the other two, citing 5 Vin. Abr. 561 A, pl. 4, 6, 18, 18, 19, 23, 24, 25, 27; 3 Co. 12; 2 Pothier, 18; P. 3 Wms. 98; 1 Chan. Cas. 271; 2 Vern. 117.

Henry, for the defendants.

KENT, Chancellor. 1. The plaintiffs, in the original suit, seek to avail themselves of a parol agreement, alleged to have been made between the parties to the mortgage at the time it was executed, by which each lot was to be bound only for a ratable proportion of the mortgage debt. The mortgage in this, as in ordinary cases, bound every part and parcel of the mortgaged premises for the entire debt; and if such a parol agreement, as is charged, can be proved and set up, it goes to vary, essentially, the operation of the mortgage deed.

This agreement is proved by Richardson, the mortgagor, as being concurrent with the execution of the mortgage, and part of the original agreement. It is as explicitly denied by the mortgagee in his answer. Two witnesses, however, prove subsequent conversations with the mortgagee, in which the agreement was admitted; but the release executed by Cooper to Richardson, in October, 1797, and accepted by him, is pretty strong evidence that no such agreement was then understood to exist.

It is, however, unnecessary to enter into an examination of the weight due to the parol proof, for I am satisfied that the objection upon the argument, to its admissibility, was well taken. There is no rule of evidence better settled, than that which declares that parol evidence is inadmissible to contradict, or substantially vary, the legal import of a written agreement. Such testimony is not only contrary to the statute of frauds, but to the maxims of the common law; and the rules of evidence on this as on most other points are the same in courts of law and of equity: *Lake v. Phillips*, 1 Ch. R. 59; *Binstead v. Coleman*, Bunb. 65; *Parteriche v. Powlet*, 2 Atk. 383; *Irnham v. Child*, 1 Bro. 92; *Portmore v. Morris*, 2 Id. 219; *Meres v. Ansell*, 3 Wils. 275; *Preston v. Merceau*, 2 W. Bl. 1249. The general rule is certainly not to be questioned or disturbed. It ought not to be a subject of discussion. It is as well grounded in reason and policy as it is in authority. Nor does this case come within any exception admitted here to the operation of the rule; for there is no allegation of fraud, mistake or surprise, in making or executing the mortgage; and those, I believe, are the only cases in which parol evidence is admissible in this court

against a contract in writing: *Marquis of Townsend v. Stan-groom*, 6 Ves. jun. 328; *Rich v. Jackson*, Id. n.

There is another rule which has some connection with this branch of the law of evidence, and which will, in certain cases, and on certain terms, admit an agreement in writing, concerning lands to be discharged by parol. But the evidence, in such cases, is good only as a defense to a bill for a specific performance, and is totally inadmissible, at law or equity, as a ground to compel a performance in specie: Sugden, 109-114, third Lond. ed., where the cases are collected. And the rule has no sort of application to this case, which sets up a parol agreement as being part of the original agreement, and the professed object of which is to alter, by substantially restricting the legal effect and operation of the mortgage.

2. The next and only remaining point in this case is, whether the release by the mortgagee on the twenty-fourth of October, 1797, of four of the lots included in the mortgage, does not, in equity, ratably reduce the power of the mortgage upon the remaining lots, inasmuch as it deprives the owners of those lots of their right of contribution as against the lots so released.

It is a doctrine well established that when land is charged with a burden, the charge ought to be equal, and one part ought not to bear more than its due proportion, and equity will preserve this equality by compelling the owner of each part to a just contribution: *Sir William Herbert's Case*, 3 Co. 14; *Harris v. Ingleden*, 3 P. Wms. 98, 99. I need not go at large into this doctrine. It is perfectly well understood, and I had occasion recently to examine it in the case of *Cheesebrough v. Van Schaick*. The court will likewise compel the creditor to aid this right of contribution by assigning his bonds and securities to the debtor or surety or owner of the land, whom he charges with his whole demand, and they will not permit him, voluntarily, to defeat this right. He owes a duty to his debtors not to impair their rights as against each other. But here the mortgagee has deprived the owners of lots No. 72 and 82 of this recourse by previously discharging the other lots; and he ought not then in equity to charge them with a greater burden than they would have been subject to upon the principle of contribution if no such discharge had taken place. This is a clear and fundamental rule of justice, which must strike at once every discerning mind, and which Pothier has illustrated in his *Treatise on Obligations*, a work which is founded in sound ethics, as well as upon the basis of the civil law: *Traite des Oblig.*, No. 275, 520.

I shall therefore direct a reference to a master to ascertain the proportion of the principal sum mentioned in the mortgage, with the interest that would, as between the owners of the several lots, be ratably chargeable upon each of the six lots contained in the mortgage; and that in making such apportionment due regard be had to the relative value of each lot at the date of the mortgage, and that he take such proof on this point as the parties may furnish; and that he further ascertain and report the proportion of the debt that lots 72 in Sempronius and 82 in Camillus would be jointly chargeable with upon such apportionment, and this latter sum, with interest, together with the costs of advertising under the mortgage, and after crediting what has been paid by the plaintiffs, is what they ought to be decreed to pay, or that the mortgage be foreclosed.

Decree accordingly.

Upon the question of the inadmissibility of parol evidence to vary the terms of a written agreement, this case is cited and relied upon in *Austin v. Sawyer*, 9 Cow. 41; *Pattison v. Hull*, Id. 754; *Meads v. Lansingh*, 1 Hopk. Ch. 134; *Wright v. Taylor*, 1 Edw. Ch. 226; *Russell v. Kenney*, 1 Sandf. Ch. 38; *Egleston v. Knickerbacker*, 6 Barb. 464; *Taylor v. Baldwin*, 10 Id. 586; *Cook v. Eaton*, 16 Id. 446; *Brewster v. Silence*, 8 N. Y. 213; *Evans v. Wells*, 22 Wend. 337 (per Edwards, senator); and *Webb v. Rice*, 6 Hill. 220 (per Boeckee, senator); *Lee v. Evans*, 8 Cal. 432. In *Frink v. Green*, 5 Barb. 456, the rule was held not to prohibit parol proof of the consideration of a deed where none was expressed; but in *Bottsford v. Burr*, 2 Johns. Ch. 415, and *Powell v. Mumford, etc.*, *Mfg. Co.*, 3 Mason, 358, it was held, citing the principal case, that where a consideration was expressed in the deed, a different one could not be proved; which, however, is a doctrine no longer held. See note to *Schermerhorn v. Vanderheyden*, 3 Am. Dec. 306.

The principal case is also referred to in the following decisions as an authority upon the general doctrine that a creditor has no right to impair his security to the prejudice of co-debtors or sureties: *Wheelright v. De Peyster*, 4 Edw. Cr. 244; *Hayes v. Ward*, 4 Johns. Ch. 130; *Ingalls v. Morgan*, 10 N. Y. 186; *Parkman v. Welch*, 19 Pick. 231, and as to the obligation of owners of land charged with a burden to bear an equal proportion of such burden in *Denman v. Prince*, 40 Barb. 217. In *Stuyvesant v. Hone*, 1 Sandf. Ch. 429, the rule laid down by Chancellor Kent, as to the effect of a release by a mortgagee of a part of the mortgaged premises, was held to be limited to cases where the mortgagee has notice of prior sales of other portions of the land. Referring to the principal case the court say: "The case is not very clearly stated, but it is apparent that Cooper, the mortgagee, had notice of Stevens having purchased the Camillus lot before he released the four lots subsequently sold by the mortgagor." In the case before the court the mortgagee had not such notice, and the part unreleased was, therefore, held to be bound for the full amount of the mortgage, notwithstanding a prior sale of some portion of the premises by the mortgagor. In *Brinckerhoff v. Lansing*, 4 Johns. Ch. 77, it was decided that the rule of the principal case did not require that a mortgagee should be delayed in his remedy until the owners of the equity of redemption could settle the question of contribution among themselves.

DUNSCOMB v. DUNSCOMB.

[1 JONES. CH. 503.]

EXECUTORS CHARGEABLE WITH INTEREST.—Where executors are negligent in not paying over moneys of the estate, or in not investing the same, they are chargeable with interest thereon.

REASONABLE TIME FOR INVESTMENT.—In most cases six months will be a reasonable time to allow executors to make investment of the trust funds before charging them with interest.

INTEREST TO TENANT BY THE CURTESY.—A tenant by the curtesy is entitled to interest for life on the proceeds of lands devised to his wife and sold after her death by the executors of the deviser under a direction in the will.

COSTS AGAINST EXECUTORS.—Executors will not be compelled to pay costs for litigating a demand of the devisees for interest on trust funds, where the demand includes more than the devisees are entitled to receive.

BILL by heirs of a devisee under a will to compel the executors to account for part of the trust funds and interest thereon. The facts were: Daniel Dunscomb, the testator, after sundry other devises and bequests, devised one fourth part of his real and personal estate to his son, Andrew Dunscomb, with directions to the defendants, his executors, to sell the estate, and to divide the proceeds according to the will. Andrew Dunscomb died leaving five children: Andrew B., Catherine, and the plaintiffs. Andrew B. Dunscomb died without issue. Catherine also died, after having intermarried with one William West, by whom she had one child, since deceased. The executors, who were also devisees under the will, entered into the possession of the estate upon the death of Daniel Dunscomb, and sold the real estate on January 31, 1804, as directed by the will. They paid to the plaintiffs three thousand five hundred dollars of the proceeds on the twenty-third of April, 1805, leaving six hundred and eighty-five dollars and forty-seven cents of their share, which had not been invested or otherwise disposed of, but which the defendants professed that they had always been ready and willing to pay when directed by the court. The share of Catherine West, amounting to one thousand and forty-six dollars and thirty-six cents was also in the defendant's hands uninvested, and her husband claimed interest thereon as tenant by the curtesy for life, and asked that the principal be put out on security for that purpose. The plaintiffs, however, claimed this sum of one thousand and forty-six dollars and thirty-six cents, in addition to the six hundred and eighty-five dollars and forty-seven cents above-mentioned, on the ground that Catherine West was never seized of any part of the estate.

Irving, for the plaintiffs.

Riggs, for the defendants.

KENT, Chancellor. 1. The plaintiffs are entitled, of course, to the sum of six hundred and eighty-five dollars and forty-seven cents, and the only point, on this part of the case is, whether they are entitled to interest upon that sum, which has lain unproductive for many years in the hands of the defendants. Why it was not paid to the guardian of the plaintiffs, who was also guardian of Andrew B. Dunscomb, in his life-time, and to whom the other portion of the moneys belonging to them was paid does not appear. The executors say it has always been kept in readiness to pay to the persons entitled when demanded. But this is no sufficient excuse. If they had met with any real doubt or difficulty as to the person authorized to receive, they could have applied to the court for advice, or brought the money into court. If the money, as we are at liberty to suppose, has been mingled with their own money, it has answered the purpose of credit; and the rule is settled that executors, and all other trustees, are chargeable with interest if they have made use of the money themselves, or have been negligent, either in not paying the money over, or in not investing it, or loaning it, so as to render it productive: *Treves v. Townshend*, 1 Bro. 384; *Rocke v. Hart*, 11 Ves. 58. The rule is founded in justice and good policy, it prevents abuse and it indemnifies against negligence. This was also the rule in the civil law when the guardian was guilty of negligence in suffering the money of the minor to lie idle. *Quod si pecunia mansisset in rationibus pupilli præstandum quod bona fide percepisset, aut percipere potuisset; sed foenori dare cum potuisset neglexisset*: Dig. 26, 7, 58.

The defendants must, in this case, account for interest on the above principal sum; and as to the time from which interest is to be computed, in such a case of negligence in suffering the money to lie idle, there does not appear to be any absolute rule, and the time must vary according to circumstances. It would be laying too heavy a hand upon executors, to charge interest from the moment money was received. In some cases, executors are allowed a year to look out for some due appropriation of the money, and in other cases it would be unreasonable. Here the executors show no pains or effort to discharge themselves of the money. I observe that six months was the time allowed in a like case, by the civil law, to the tutor to invest the funds: Domat. b. 2, tit. Tutors, ch. 3, s. 23; Voet. lib.

26, tit. 7, s. 9; and if the defendants are charged with interest after six months from the time they received it, it will not be unreasonable in this case, and I shall accordingly direct it.

2. The husband of Catherine P. West is entitled, as tenant by the curtesy, to the interest of the proceeds of her share of the real estate, which was sold after her death. His right became perfect upon her death; and he was seised in fact, by the seisin and possession of the co-devisees as tenants in common with her, and claiming only their undivided shares with her under the will. It will, therefore, be the duty of the defendants to place the sum of one thousand and forty-six dollars and thirty-six cents at interest, on good real security, or invest it in public stock, and pay the interest thereof to William West, as the same shall from time to time accrue, during his natural life; and the plaintiffs and their lawful representatives will be entitled to the principal upon his death. The case of *Sweetapple v. Bindon*, 2 Vern. 536, contains the rule applicable to this case, allowing the interest of money to be settled upon the tenant by the curtesy, in lieu of the profits of the land.

3. The only remaining point in the case is as to costs. It does not follow as an inevitable consequence that executors must pay costs in all cases where they must pay interest; though the general rule is, that they must pay costs when they pay interest, because they are in default: 1 Ves. jun. 294; 7 Id. 129; 11 Id. 61, 582; 13 Id. 402. If the demand of the plaintiffs had been confined to the sum of six hundred and eighty-five dollars and forty-seven cents, the defendants ought to have paid costs; but the demand went further, and embraced a larger sum, to which the plaintiffs are not entitled until the death of the tenant by the curtesy. That demand has been successfully resisted, and it was a question properly submitted by the executors to the direction of the court. Under the circumstances of the case I cannot allow costs to either party as against the other.

Cited in *Brown v. Ricketts*, 4 Johns. Ch. 305; *Hasler v. Hasler*, 1 Bradl. 252; *White v. Parker*, 8 Barb. 73; *Duffy v. Duncan*, 32 Barb. 593; *Gillet v. Van Rensselaer*, 15 N. Y. 397; *Bundle v. Allison*, 34 N. Y. 184; *King v. Talbot*, 40 N. Y. 95; *Boynston v. Dyer*, 18 Pick. 6; *In re Thorp, Davies* (2 Ware) 293; *Piatt v. Oliver*, 2 McLean, 313.

SCHIEFFELIN v. STEWART.

[1 JONES, CH. 620.]

COMPOUND INTEREST AGAINST ADMINISTRATOR.—An administrator who converts the trust moneys to his own use, or employs them in his business without accounting for the profits, is chargeable with compound interest.

BILL by an administrator against heirs for an account and for compensation for the execution of his trust. The plaintiff, as one of the administrators of the estate of Joseph Hopkins, deceased, and as guardian of some of the children, filed his bill against the heirs, etc., praying that an account be taken and that he be allowed a reasonable compensation for his great care and trouble in administering upon the estate, etc. The defendants in their answer submitted to an account, but denied the claim for compensation and prayed that the plaintiff be decreed to pay over the trust moneys in his hands with interest. The cause was referred to a master, who took an account and reported, among other things, that with a few trifling exceptions all the debts of the estate were paid on the sixth of July, 1805, about two years after the death of the intestate, and that from that time to the date of the report, February 6, 1815, the plaintiff had had in his hands, of the trust moneys, at no time less than thirty-three thousand dollars, which were wholly unproductive to the estate, but which had been intermingled with the plaintiff's own funds, and which he had employed in his business by making large loans and investments for his own benefit, without accounting for any part of the profits. The master, therefore, charged compound interest against the plaintiff upon the balances in his hands from the said sixth day of July, 1805, for that purpose making annual rests in the account, and reported the whole amount due from him to the representatives of the intestate to be fifty-nine thousand six hundred and fifty-eight dollars and sixty-eight cents. The case was heard on exceptions to the report.

Van Vechten and H. Bleecker, for the plaintiff, cited 1 Ves. jun. 99; 2 Atk. 410, 534, 604; Prec. in Ch. 254; 1 Brown, 375, 384; 3 Id. 74.

Henry, for the defendants, cited 4 Ves. jun. 620; 7 Id. 129; 11 Id. 59, 99; 12 Id. 388.

KENT, Chancellor. As the plaintiff took no exception to the testimony taken before the master, and has not shown, by affidavit, what that testimony was, nor called upon the master

to report the facts, I have a right to presume that the master had sufficient evidence before him to warrant the conclusion that the plaintiff had used and employed the money belonging to the estate in his business or trade. The master says, that the fact of the appropriation of the assets by the plaintiff to his own use, appeared from the vouchers submitted in taking the account, and from the examination of the plaintiff. How can I say, then, that this allegation is not correct and true? I am bound, as the case is now before me, to consider every fact stated in the report to have been duly established by competent proof; and the only real question in the case is, whether the charge of compound interest be proper.

It has been settled, by repeated decisions, that executors and administrators are not entitled to any commission for executing their trust; and it is equally well established that they must, at all times, pay interest for moneys of the estate converted to their own use. These two points I was led to examine with much care, in the cases of *Duncomb v. Duncomb*, [ante, 504] and *Manning v. Manning*, 1 Johns. Ch. 527, and to which it will now be sufficient for me to refer. The only point worth considering is the compound interest which the master has allowed.

No just complaint can be made of the time from which the computation of interest began. The plaintiff was allowed nearly two years to settle the estate, without being chargeable with interest. For a considerable part of that time he had a large balance in hand, and the time was amply sufficient, in this case, to close the concerns of the administration, and the debts were all paid within that time, with one or two trifling exceptions. It was the duty of the plaintiff, from that time forward, to have made distribution of the assets, or place them in a situation to become productive, and to accumulate for the heirs. He did neither, but employed the money in his own business, or trade, or in making large loans for his own benefit; and as he has not disclosed (as he might have done to the master), what were the profits of the assets so employed, it appears to me, as well on principle as on authority, that he is justly chargeable with the interest contained in the report. The only way for the plaintiff to avoid this conclusion, was by fairly disclosing what he had made by the use of the money.

The courts were anciently quite lax on the subject of these personal trusts, and allowed executors to convert the moneys of the testator to their own use, without any account for interest. This must have been the source of great abuse, and was unjust

towards the *cestui que trust*. With such a pecuniary privilege, the office of trustee, as Lord Loughborough expressed himself, would be canvassed for. This blemish in the English jurisprudence was corrected as early as the case of *Ratcliffe v. Graves*, 1 Vern. 196; 2 Ch. Cas. 152, in which the lord keeper held, and as it is said against many precedents, that the administrator must pay interest for the moneys of the estate employed in his own business; and he laid down this principle, which runs through all the subsequent cases, that an executor ought not to turn the money to his own private advantage. The rate of interest is not stated; and from different reports of that case, it is uncertain whether the money was employed by the administrator in trade or in loans. The recognition of the principle was, however, a great improvement; but the modern cases have felt the necessity of explaining and defining the duties and responsibility of the trustee with more precision, in order to give greater efficacy to the just and salutary doctrine, that a trustee shall never be permitted to make gain to himself of the trust-property.

In *Newton v. Bennet*, 1 Bro. 359, the executor mixed the testator's money with his own, and applied it in the course of his trade, and the master, in taking the account, made rests every year, and reported a large balance against the defendant, and the question was, whether he should pay interest for the sums from time to time, in his hands, and it was decreed that he should. In this case, I should conclude, that compound interest was allowed, though the making of periodical rests, in taking an account, seems not, of itself, necessarily to imply it. Accounts have frequently been directed to be taken with annual rests: 2 Atk. 410, 534; 6 Bro. P. C. 319, old ed., perhaps to see whether interest ought to be charged, or to relieve the defendant in the application of his payments, and in one instance they were expressly directed to be made without prejudice to the question of interest: 16 Ves. jun. 97. Whatever might have been the fact, in the case above cited, it is certain that the allowance of compound interest is often essential to carry into complete effect the principle of the court, that no profit, gain, or advantage, shall be derived to the trustee from his use of the trust funds. All the gain must go to the *cestui que trust*. This is the true equity doctrine. It secures fidelity, and removes temptation, and it is the ground of this allowance of annual rest, in the taking of the account, where the executor has used the property, and does not disclose the proceeds. The principle

was more clearly enforced in *Treves v. Townshend*, 1 Bro. 384, which was the case of the assignee of a bankrupt, who suffered the money of the estate to lie idle for years with his private banker. The chancellor considered money so placed as answering the purpose of credit and trade, and though four per cent. was the usual interest of the court, in a case of mere neglect to pay, yet it was presumed that the money was worth five per cent. to the assignee, and he was held to account for all the gain, and five per cent. interest was accordingly decreed, with costs. The same rule appears in a variety of other cases: 1 Ves. Jun. 89; 4 Id. 620; 11 Id. 58, in which the increase of interest to five per cent. was given to meet a presumed gain. In *Pocock v. Reddington*, 5 Ves. jun. 794, an executor having been guilty of a breach of trust by selling out stock, and dealing improperly with the trust money, the *cestui que trust* was allowed the option to have the stock replaced, or the proceeds of the sale, with interest at five per cent., or more, if more had been made by it. The observations of Lord Alvanley, in that case, are strong and impressive. The defendant "had very imprudently, and, he must say, very improperly, taken upon himself to lend the money of his ward to his own friends, and upon personal security, and for that purpose he sold out stock," etc. "That was a transaction that it was impossible to pass without animadversion. He had no right to put it in that hazard. No man is justified in putting the property of which he is trustee in jeopardy. Therefore, he must answer for the money with what he may be supposed reasonably to have made, and if he made more, he must answer for that too."

But there are cases which not only contain the general principle, that a trustee using the trust money must account for all the profits of it, but in order to reach that profit, when it is not otherwise ascertained, they adopt the very rule of computation contained in the report before us.

In *Foster v. Foster*, 2 Bro. 616, the defendant was executor of a receiver, and the money was derived from the rents and profits of land; and the master was directed to compute interest at four per cent. on the balance he should find each year in the hands of the receiver, and also of the executor. In *Raphael v. Boehm*, 11 Ves. jun. 92, the direction was to take an account against the executor, who was a trader, and to compute interest at five per cent. on moneys in his hands from the time he received it, and in such computation to make half yearly rests for the very purpose of allowing compound interest. This was carrying the

rule far beyond the present report, and the case led to a full and able discussion of the whole principle; and the general rule was sanctioned by Lord Eldon, under the influence of all that caution and anxious inquiry for which he is distinguished. It was declared in that case to be the general understanding of the masters that where rests were directed to be made in taking an account, they were to be made with the view of computing compound interest; and it was admitted by the counsel who opposed the allowance, that if a trustee had made, or if there was ground to infer that he had made, compound interest or more, he must account accordingly. The chancellor observed that the charge of compound interest in that case was consistent with every view of moral justice; and that the court would shamefully desert its duty to infants by adopting a rule that executors might keep money in his hands without being answerable, as if he had accumulated. The same rule was afterwards adopted by Sir Wm. Grant in *Dornford v. Dornford*, 12 Ves. jun. 127.

It would be easy here to show, as was done in that case, the injustice to the infants in denying compound interest, and the direct gain that would be permitted to the plaintiff. Thus in July, 1805, he had on hand thirty-three thousand dollars of moneys belonging to the estate, and no debts to pay. In July, 1806, he received, as we must presume, for the use of that fund in his trade and by his loans, at least the simple interest, or two thousand three hundred and ten dollars. That sum he will then retain in his business for nine years, or to the taking of the account, free of interest. The next year, or July, 1807, he receives another year's interest, and will then have in hand of interest four thousand six hundred and twenty dollars, to be used for his own advantage for eight years, free of interest. The third year he will have in hand near seven thousand dollars, to be retained for seven years, without interest, and so on down to the date of the report. The fund, instead of accumulating for the benefit of the infants, accumulates for his benefit. In this way, as Lord Eldon observed, the property would be nearly as beneficial to the executor as to the infant, and this would overthrow the principles of the court. Such a consequence cannot be endured. A man in trade could afford a large premium for letters of administration upon a rich estate, especially if the infant heirs were very young. What temptation would thus be held out to delay and negligence in rendering an account! What inducements to trustees to employ the trust

moneys in their own private speculations and trade to the hazard of the loss of the whole fund!

In the ordinary case between debtor and creditor, compound interest is not recoverable. This point I had occasion to examine fully in the case of *Connecticut v. Jackson*, [ante, 471]. But here a charge of such interest becomes indispensable to enable us to reach the gain or profit which the plaintiff ought to refund.

It cannot be amiss to observe at the conclusion of this opinion, that the civil law was not forgetful of the justice or necessity of such a strict provision against trustees who converted the trust moneys to their own use. While it gave ordinary interest against the tutor who suffered the pupil's money to lie idle; yet if he converted it to his own purposes, he was held responsible for interest *non ex more regionis*, (as five, four or three per cent.), *sed gravissimas vel maximas usuras*, which different commentators fix at twelve, or eight, or six per cent., while four per cent was the ordinary interest: Dig. 3, 5, 38; Id. 26, 27, 7, 6 and 10; Code, 5, 56, with the notes of Gothofriedus, and Voet's Comm. ad Pand. lib. 26, tit. 7, s. 9. Such coincidence on this particular point between two such systems of jurisprudence, serves of itself to show that the principle adopted has a clear foundation in natural justice, or at least is recommended by the obvious dictates of public policy. Indeed, it appears to me to be an interesting fact, that the refusal of compound interest, in ordinary cases, between debtor and creditor; the denial of compensation to executors and other trustees; the charge of simple interest against them when they negligently suffer the trust moneys to lie idle; and the charge of extraordinary interest against them when they convert it to their own use, are distinct principles, not only well settled in the English law, as I have abundantly shown in this and in other cases referred to, but they all existed as known principles in the civil law of Rome. And those principles, from the prevalence of that code, are now probably acknowledged and settled as part of their common law in most of the continental nations of Europe. This historical fact is calculated to inspire us with much respect for these principles, independent of their practical utility in securing the diligence and fidelity of trustees.

The exceptions to the report must accordingly be overruled.
Exceptions overruled.

Upon the general doctrine that executors, guardians and other trustees will not be permitted to make personal gain out of the trust funds and that they must account for all profits made thereon, etc., the principal case is cited in

Brown v. Ricketts, 4 Johns. Ch. 305; *White v. Parker*, 8 Barb. 53; *Utica Ins. Co. v. Lynch*, 11 Paige, 523; *Gilman v. Gilman*, 2 Lansing, 1; *Gillett v. Van Rensselaer*, 15 N. Y. 400; *Seaman v. Duryea*, 10 Barb. 534; *Garniss v. Gardiner*, 1 Edw. Ch. 130; *Lansing v. Lansing*, 31 How. Pa. 64; S. C. 1 Abb. N. S. 288; S. C. 45 Barb. 191; *Piatt v. Oliver*, 2 McLean, 313; *Taylor v. Benham*, 5 How. (U. S.), 274; *In re Thorp, Davies* (2 Ware), 293; *Doggett v. Emerson*, 1 Wood. & Min. 205; *Boynton v. Dyer*, 18 Pick. 6-8. In the cases of *Lansing v. Lansing* and *Garniss v. Gardiner*, *supra*, it is said, however, that it is only in cases of gross delinquency that such trustees will be charged with compound interest. The vice-chancellor says, in the last mentioned case: "In *DePeyster v. Clarkson*, 2 Wend. 77, it was contended *arguendo* that *Schieffelin v. Stewart*, and the English cases there cited were not supported by authority. The court of errors, however, expressed no opinion upon the point, as the cause was decided on another ground. The case of *Schieffelin v. Stewart* has not been overruled; and as far as my observation extends, it stands as an authority to be followed in similar cases."

OSGOOD v. FRANKLIN.

[2 Johns. Ch. 1.]

SUIT BY EXECUTOR—PROBATE OF WILL.—In a suit by an executor, probate of the testator's will, taken out at any time before the hearing, is sufficient to support the plaintiff's demand, no objection having been made by pleading.

MISJOINDER OF PARTIES.—The objection that parties have been made defendants in a suit who should have been joined as plaintiffs goes only to a matter of form, and will not be regarded by the court at the hearing, where the parties thus made defendants have accepted that character, and have filed their answer.

POWER TO EXECUTORS—SURVIVORSHIP.—A power given by a will to the executors to sell real estate survives if it be coupled with a legal or equitable interest in the estate or with a trust, the execution of which depends upon the sale.

INADEQUATE CONSIDERATION—RESCISSIION OF CONTRACT.—Mere inadequacy of price, unless it be so gross as to amount to evidence of actual fraud, is not a ground for avoiding a sale, although the court might refuse to decree a specific performance.

LIABILITY OF EXECUTOR.—An executor is liable only for the amount actually received upon a sale of property of the estate, unless he has been guilty of very gross negligence, or of willful default.

BILL by the surviving executrix of a will against the representatives of deceased co-executors and the residuary legatees under said will for an account, and a cross-bill by the defendants to set aside a certain sale made by the executrix, and also for an account.

Walter Franklin being possessed of a large estate, died on the first of August, 1780, having made his will on the twenty-first of February, 1778, by which he made sundry devises and

bequests of his property, and appointed his wife Mary, and his three brothers, John, Thomas, and Samuel Franklin, his executors. The material portion of the will is stated in the opinion. The property of the estate consisted chiefly of some twelve thousand acres of land in Schoharie, Montgomery and Otsego counties, in New York, called "the Cherry valley lands," and sundry other tracts in Greene county, in the Waywayanda patent in Orange county, and elsewhere in New York, and also in the state of Vermont. Letters testamentary upon the will were issued to John and Samuel Franklin, as executors (Thomas Franklin having declined to act); and the said John and Samuel acted as such executors until the death of John, in 1801, whereupon Samuel continued sole acting executor until his death in 1807. Upon the death of Samuel, Mary, the widow of the testator, who had in the meantime intermarried with one Samuel Osgood, undertook, with her said husband, the administration of the estate. In June, 1808, the said Samuel Osgood and Mary, his wife, as such executors, claiming to act under a power in the will, sold the residuary estate, consisting of the lands above mentioned, to De Witt Clinton and John L. Norton for the sum of twenty-five thousand dollars, which, with the further sum of three hundred and forty-seven dollars, due the estate, was all that the said Samuel and Mary Osgood ever received therefrom.

John and Samuel Franklin were at their death largely indebted to the estate in certain sums owing to the testator in his life-time, and also for moneys of the estate used by them in their private business, and not accounted for. Thomas Franklin, who died before the commencement of the suit, was also, at his decease, largely indebted to the estate. The original bill was filed in November, 1808, by Samuel and Mary Osgood, as plaintiffs, against Thomas, Anthony and Walter Franklin and John Townsend, executors of John Franklin, deceased, Abraham and John Franklin, sons and executors of Samuel Franklin, deceased, and Walter and Thomas R. Franklin and Samuel Pleasants, executors of Thomas Franklin, deceased, and the residuary legatees of the estate of Walter Franklin, as defendants, and prayed for an account and payment from the said executors of John, Samuel and Thomas Franklin, respectively, of moneys due the estate, and for a discovery, and that the residue of the estate might be distributed, etc. The cross-bill was filed June 7, 1809, by most of the defendants in the original suit, as plaintiffs, against Samuel and Mary Osgood,

De Witt Clinton and John L. Norton, as defendants, and prayed an account and distribution, and also that the above-mentioned sale of the residuary estate, to Clinton and Norton, be set aside, on the ground that the same was corruptly, collusively and fraudulently made, for a sum far less than the value of the lands, and on the further ground that Mary Osgood, as surviving executrix, had no power to sell the real estate. The testimony taken upon the cross-suit as to the value of the lands was conflicting. Some of the witnesses who lived near the Cherry Valley lands, testified that in their judgment those lands were worth from ten to fifteen dollars per acre in 1808. There was testimony also that some of the land had been sold in 1809, for fifteen dollars per acre. On the other hand, it appeared that at the time of the sale, the title to nearly all the lands in Vermont and to much of those in New York had been lost from various causes, and that the only lands remaining to the estate, which were of any considerable value, were the Cherry Valley lands. It also appeared that these latter lands, through the neglect and inattention of the former executors, had become heavily burdened with adverse possessions and with claims for improvements, under a contract made by the settlers thereon, in 1786, with Col. Isaac Corsa, who assumed to act as agent for the executors, which contract had been ratified by one if not both of the former executors. There was also at that time a cloud upon the title to these lands, owing to the fact that the deed of the original patentees to Dubois, from whom the testator purchased, had been lost.

In consequence of these adverse claims, and this doubt as to the title, several witnesses testified that at the time of the purchase by Clinton and Norton, the lands were not worth in the aggregate twenty-five thousand dollars. One witness, John Lawrence, said that he would not have given that sum for them, anticipating trouble with the settlers. Another witness, Samuel Riker, testified that a large tract of similar lands in Otsego county had been about that time sold at auction in New York city, for two dollars per acre. It appeared also that after the purchase by Clinton and Norton, they had been at considerable expense in the way of litigation concerning these lands, and also that by diligent search they had succeeded in finding the deed to Dubois. As to the question of the alleged power in the will, it appeared that the original will had been lost, but there had been two probates of it, in one of which the language of the power was: "I give to my executors that may act," etc.

In the other the words were: "I give to my executors that they may act," etc.

Mary Osgood and Samuel Osgood, and some of the defendants in the original suit, having died before the final hearing, the suit and cross-suit were duly revived and continued in favor of and against their representatives respectively; and Abraham and John Franklin, plaintiffs in the cross-suit having been discharged under the insolvent act, their assignees were, by a bill of revivor and supplement, made defendants and appeared and submitted their rights to the court.

Harison, Colden, Slosson, Bracket and Clark, for the defendants in the original suit and the plaintiffs in the cross-suit.

T. A. Emmet, for the defendants in the cross-suit.

Riggs, for the defendant Norton.

Wells, for the defendants Norton and Clinton.

Baldwin, for the defendant Clinton.

S. Jones, jun., for the representatives of Mrs. Osgood.

KENT, Chancellor. The controversy between the parties arises in the cause which was commenced in 1809 between Franklin and others against Osgood and others. Two preliminary objections were raised by the counsel for the defendants: 1. That letters testamentary on the will of Thomas Franklin were taken out in Pennsylvania, and are of no force here; 2. That the assignees of Abraham and John Franklin, who are insolvent, ought to have been plaintiffs, instead of being defendants, as their interest, if any, is as plaintiffs; and that they cannot be made defendants, unless they had refused to be complainants, or were in collusion against them.

The production of a probate recently taken out in this state is a sufficient answer to the first objection; for it seems to be pretty well settled, that where no objection is raised by pleading, a probate taken out at any time before the hearing is sufficient, in this court, to support the plaintiff's demand: *Humphreys v. Humphreys*, 3 P. Wms. 351; *Fell v. Lutwidge*, 2 Atk. 120; *Patten v. Panton*, cited in Bacon, title Executors (E), pl. 14, ed. by Gwillim. With respect to the second objection, the assignees could not be compelled to be plaintiffs; and it is admitted, that if they had not consented, they must have been made defendants. It is sufficient for the merits of the case that they are before the court, and the objection goes only to a mat-

ter of form. But as the assignees have put in their answer as defendants, and have made no objection to that character, I would even infer their refusal to join as plaintiffs, if it were necessary to avoid any embarrassment from such an objection raised at the hearing.

1. The first question arising on the merits is, whether Mary Osgood, as sole surviving executor of Walter Franklin, deceased, was authorized to sell the real estate.

The part of the will of Walter Franklin, relating to the question, is as follows: "The whole residue of my estate I give and bequeath as follows: One eighth to Sarah Corsa, etc.; one eighth to Mary Wistar, etc.; to my wife, one eighth, etc.; to my daughters, Maria and Sarah, each one eighth; to my brothers, John, Thomas and Samuel, each one eighth, etc. And I order that the money or effects be distributed and divided from time to time, as it can be raised from my debts and estate by my executors, hereafter named, etc.; and they are to keep a sufficiency undivided, to pay off all legacies, and to keep the estate as much on interest or rents as they can for the general benefit. And I appoint my wife, with my three brothers aforesaid, to be executors; but on this condition, that if they owe me any money at my decease, their appointment or acting as executors shall not be a release of their debts, but the same shall be paid; and if they do not act on this condition, they are not to be executors. I give to my executors that (they) may act, and to the major part of them, their heirs or executors, full power to sell any or all my real estate not already devised, etc. I give to each of my executors who shall act, two hundred pounds, in lieu of all other commissions and rewards," etc.

If the case turned upon the dry question, whether by the common law a naked power, without interest, to executors to sell, would survive, I should deem the authority of Lord Coke decisive. He lays down the rule repeatedly in his *Institutes* (Co. Litt. 112 b, 113 a, 181 b), as one well established, that the power would not survive; and the same law was declared by Dodderidge, J., the contemporary of Coke, and author of the *Touchstone*: Shep. Touch. tit. Testament, pl. 9, p. 429. These writers were, in their time, and have been in every period since, regarded as oracles of the common law, and they must have been familiar with the old authorities. I do not therefore consider the observations of Mr. Hargrave (Co. Litt. 113 a, note), even after giving them all the weight justly due to his talents and learning, as being sufficient to overturn a rule so strongly

established; and especially when it has been shown by Mr Powell (*Treatise on Devises*, 292-310) that he is by no means borne out by the cases to which he refers. The statute of 21 Hen. VIII., c. 4, affords no small confirmation of the doctrine in Coke; for the preamble declares the opinion that a sale by executors under a power in a will "can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named to and for the same."

But while I thus acknowledge the rule of the common law, I am equally satisfied that this cause is not governed by it. In the first place, this case comes within the exception stated by Lord Coke; for here was an interest sufficient to feed the power and keep it alive in the hands of the surviving executors. The executors were vested by the will with an absolute interest in an undivided moiety of the whole residuary estate, on which the power was to operate, and they were also directed to keep the whole of this residuary estate as much as possible on interest, or rents, for the general benefit. This authority to lease, and this interest in the subject itself, must be sufficient to exempt the power from the character of a mere naked authority to a stranger. It is not necessary that the interest coupled with the power should be a legal interest. An equitable estate is sufficient, and is regarded in this court as the real interest. So it was held by Lord Hardwicke in *Hearle v. Greenbank*, 3 Atk. 714; nor does the character of the power depend upon the quantity of interest. A trustee invested only with the use and profits of the land for the benefit of another, has an interest connected with his power. This was so understood in *Bergen v. Bennett*, 1 Cai. Cas. 16 [2 Am. Dec. 281], and in *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 102, a testamentary guardian, with authority to lease, was held to possess a power coupled with an interest, and capable of survivorship.

In the next place, here was a trust charged on the executors, in the direction given to them to distribute the proceeds of the residuary estate; and according to the settled doctrine of the court, the trust does not become extinct by the death of one of the trustees. It will be continued in the survivor, and cannot be permitted in any event to fail of execution for want of a trustee. In this case one of the trusts under the will depended upon a sale. In *Garfoot v. Garfoot*, M. 15 Car. II., 1 Ch. Cas. 85, lands were devised to the wife for life, and then to be sold by the executors for younger children's portions, and the wife

and executors died, and the younger children exhibited their bill to compel the heir to sell; and on demurrer by the heir, on the ground that the executor had but an authority which died with him, the demurrer was overruled. So, also, in *Barnes's case*, Sir Wm. Jones, 852, Cro. Car. 382, S. C., lands were devised to the wife for life, and then to be sold by the executors for payment of debts and legacies, or as one of the reports of the case says, to be divided among the nephews. One of the executors died, and it was held, on a case sent from chancery for the opinion of the judges at law, that the survivor could sell, though the executors had an authority and no interest. Whatever, therefore, might have been the character of the power in this case, the strict rule of the common law could never be permitted, in this court, to defeat the trust connected with the execution of the power. Whether the residuary legatees might not have come in and taken the land itself, instead of the proceeds which the executors, as trustees, were to distribute and thereby have arrested the execution of the power to sell, is a point not now before me. No such application was ever made; the power to sell was left by the legatees to its full operation; and they come too late, after the sale to make their election, or to raise such a question.

Either of these grounds appears to me to be sufficient to support the sale by Mrs. Osgood, as the sole surviving executor. There are other considerations also which add great weight to this conclusion.

The intention of the testator is much regarded in the construction of these powers, and they are construed with greater or less latitude in reference to that intent. It was evidently the testator's intention here, that the power should not fail as long as there was an executor to execute it, for the power is given even to the major part of the acting executors, and it was to descend to the legal representatives, both real and personal, of the executors. In other words it was made transmissible by descent and by will; and though it is left doubtful as to the portion of the executors from whom that transmission was to proceed, I should take the better opinion to be, that it was to proceed, as in the case of other joint interests or trusts, from the last survivor, and that the testator could not have intended such incongruity and confusion as the union of the heirs and executors of a deceased executor with the surviving executors. The testator had also in contemplation the possible case of his wife acting alone; for he imposes a condition upon the other

executors, without complying with which they were not to be considered as appointed. I am satisfied, for these reasons, that it would be repugnant to the intention of the will, to the rules of law, and to the principles of this court, to defeat a power uniting so much trust, confidence and interest, by applying to it the strict doctrine of the common law, relative to mere naked authorities.

2. The next point made on the part of the legatees is, that the sale was a fraudulent breach of trust, and ought either to be set aside, or if permitted to stand, that the representatives of Osgood and his wife ought to account for the real value of the lands at the time of the sale, instead of the price at which they were sold. The ground relied on in support of the charge of fraud is the inadequacy of the price. I have examined the authorities on this point, and I am satisfied that it is not, of itself, and ought not to be, a justifiable cause of interference, unless the inadequacy be so gross as to be evidence of actual fraud. I see no just pretext for the charge that the sale was not made by the executrix and her husband in good faith; nor do I think that, under the circumstances of this case, there was any such inadequacy of price as to give color to the inference of fraud.

There is no case where the mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression. And the inequality amounting to fraud must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense: *Sir Th. Clarke, in How v. Weldon*, 2 Ves. 516; *Lord Thurlow, in 1 Bro. 9*; *Lord Ch. B. Eyre, in 2 Id. 179*, note; *Lord Eldon, in 9 Ves. jun. 246*; *Sir William Grant, in 16 Id. 517*. There is a very important distinction which runs through the cases between ordering a contract to be rescinded and decreeing a specific performance. Though inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded (unless its grossness amount to fraud), yet it may be sufficient for the court to refuse to enforce performance. It is not an uncommon case for the court to refuse to enforce for inadequacy, and at the same time to refuse to rescind. The two cases admit of very different views and considerations. This whole subject was very fully discussed in *Mortlock v. Buller*, 10 Ves. jun. 292, which was the case of a bill for a specific performance of a contract of sale of land by the defendant as agent of trustees. The

land was sold in September, for twenty-six thousand and five hundred pounds, and in December following, the plaintiff had contracted for the resale of a part only for thirty-four thousand and nine hundred pounds, and the trustees refused to ratify the sale. There was no imputation of fraud in the transaction. The character of the parties was unimpeached, and though the plaintiff had neglected no previous means of information as to the value of the land, yet the chancellor said he was at full liberty to do so, and might honestly contract with persons at arms length, and dealing for themselves. But, he said, there was a want of care and attention on the part of the trustees, in not exerting a wise and full discretion as to a reasonable price, amounting to a breach of trust, and he thought himself not bound to afford relief to a purchaser who had contented himself with a contract, instead of a conveyance, and so dismissed the bill. There can be no doubt from the language of the court that if the conveyance had been executed it would have stood, notwithstanding the inadequacy. Thus, in *Day v. Newman*, cited in 10 Ves. jun. 300, Lord Alvanley refused to enforce a specific performance of an agreement for the sale for twenty thousand pound of an estate worth only ten thousand pounds. There was no actual fraud in the case, but the inadequacy was so great that he would not enforce the contract against the seller; nor on the other hand, would he sustain a cross-bill to rescind it.

I need not multiply cases on this point. The doctrine is settled that in setting aside contracts, on account of inadequate consideration, the ground is fraud arising from gross inequality. Unless the inequality does of itself *ex evidentia rerum*, prove fraud, the rule is, says Ch. B. Macdonald, 1 Wightwick, 109, that inadequacy by itself has not the weight suggested. If, indeed, advantage be taken on either side of the ignorance or distress of the other, it affords a new and distinct ground, not applicable to this case, and a very great inadequacy may form a presumption of oppression: 1 Wightwick, 28, 29; 3 Ves. & B. 117. Dealing with young heirs, and for reversionary interests, is also watched with the utmost jealousy, and constitutes a particular class of cases, forming another exception to the general rule that for mere inadequacy of price a contract is not to be set aside: *Evans v. Peacock*, 16 Ves. jun. 512; *Gowland v. De Faria*, 17 Id. 20.

So leases of charity estates will be set aside for an under-value, if considerable, though there be no imputation of fraud

on grounds peculiar to that trust: 18 Ves. jun. 315. But none of those exceptions to the general rule apply to this case. Here is no imputation on the character of the parties, and there is no appearance of undue means or influence, or of the practice of any kind of imposition. The most that can be said is, that the property would have been vastly more productive if the executor had taken more pains to ascertain the title, and had made the sales in small parcels, and to settlers upon credit. As the property was situated at the time of the sale, I do not believe, from any proof in the case, that the land could have been sold at that time, in one entire parcel, at a better price. The testimony of John Lawrence and of Samuel Riker, jun., serve to confirm me in this opinion. The land at that time was, in general, heavily incumbered with adverse claims and pretensions. The former acting executors, who were then dead, and whose representatives are among those who are now seeking to impeach the sale, had suffered all this residuary estate to lie unregarded for upwards of twenty years, and adverse possessions were fast closing upon the Franklin title. These possessions (I speak now of the Cherry valley lands, and which, indeed, are the only lands of much moment in the case) were generally held under a contract made in 1786 by Col. Corsa, as assumed agent of the executors, and whose agency and contract the executors, or one of them, had ratified. By this contract the settlers were to be paid for their improvements if they did not purchase. This claim was a great incumbrance on the title. It is well known that improvements made by settlers are generally valued quite high; and it is in proof in this case that such claims exceed in many instances the value of the land at the time the settlement was made. I do not perceive, from my present view of the claim under Col. Corsa as shown by proof here, but that it might have been established in equity, if the application had been made in time. There were likewise defects in the chain of title, which had excited a general distrust of its validity; and this title was not made complete until the discovery of the release of the original patentees to Dubois, some time after the sale in question. It was found in the possession of William North; and as the former executors knew nothing of this paper, Mrs. Osgood had good reason to presume that it was irretrievably lost. There is no doubt this estate has suffered greatly by negligence, but it was a negligence of twenty years' standing, imputable in a great degree to the two former executors, who had the sole management of the trust.

These difficulties in the way of title have been justly and strongly urged to show that the price is not to be charged with inadequacy, under all the circumstances of the case. Lands in such a situation have no determinate value, and they are not to be estimated by the price of improved farms or lots which have a clear title and may yield a known and steady rent. Accidental subsequent advantage made of a bargain is nothing, according to Lord Eldon: *Coles v. Trecothick*, 9 Ves. jun. 246. If we were to take such a ground, every transaction of this kind would come into a court of equity. The purchasers in this case immediately bestowed the utmost diligence to assert their title and recover the lands, and by the fortunate discovery of title deeds and by still more fortunate suits and negotiations, they must have been able to avoid the statute of limitations and to escape the embarrassment of the claim for improvements, and have turned their speculation to great advantage. I see nothing unusual in this, nor anything censurable on the part of the purchasers, and the suit as against them ought to be dismissed, with costs.

I have confined my attention solely to the circumstance of inadequacy of price, because no other was stated or urged by the counsel, and no other has occurred to me as evidence of fraud. The only question of any serious doubt in the whole case is, whether there was not a want of attention and vigilance on the part of Mrs. Osgood, amounting to a breach of trust, so as to render her representatives chargeable beyond the moneys actually received. I think, upon the whole, this would be too rigorous a conclusion. A court of equity, according to the lord keeper, in *Palmer v. Jones*, 1 Vern. 144, never charges a trustee with imaginary values or with more than he has received, unless the proof be very strong of supine negligence. Lord Thurlow said it must amount to a case of willful default: 1 Ves. jun. 193. Mrs. Osgood had an interest of one eighth in this residuary estate, and though the sale was to her two sons-in-law, yet she had children living by her second husband, Mr. Osgood; and she and her husband never could have made an intentional sacrifice of that estate, because it would have been sacrificing their own interest and that of their other children. In that sale, then, it may be said they took the same care of the interest of others as of their own. There were many considerations that might have had a rational and powerful influence on the minds of Mr. and Mrs. Osgood. This estate had been for more than twenty years under the sole care and management of the other execu-

tors, who were equally legatees, and who had suffered the estate to fall into ruin. The title was handed over to Mrs. Osgood in an embarrassed and doubtful state, and a very considerable part of the claim under the testator was null and void. This was the case with the Waywayanda claim and with the lands in Greene County, and most of the lands in Vermont. The only valuable property was the Cherry Valley lands, and they were covered with adverse possessions, and with settlers with burdensome claims for improvements. What was the executor to do? To undertake to recover these lands might lead to great expense, which would eat up the value of the estate. They aver in their answer that they deemed it best for the interests of the legatees to sell at once the whole estate for the best price that could be obtained, and there is no reason to doubt the sincerity of this allegation. Whether that was or was not the most advisable course, under the then existing circumstances was a difficult question, on which intelligent and prudent men might differ. I do not think that I am bound by any principles in this court to deal so hardly with Osgood and his wife as to make either of them responsible as trustees for an error of judgment, and I shall, therefore, not hold them answerable beyond the amount of the sale.

In arriving at this conclusion, I have been much governed by a view of the peculiar situation of the property when the trust was assumed by Mrs. Osgood, and of the desperate condition to which it was reduced by the folly and negligence of the former executors, and the tacit acquiescence of all parties in interest. The case would have been very different, if she had been an acting executrix from the beginning. To exact of her a responsibility for the defaults of others, would be unjust. When she assumed the trust, in 1807, she was under the necessity of commencing, at once, a series of extraordinary efforts, and of expensive litigation, sufficient to strike ordinary minds with dismay, or of closing the concern of the administration of the estate by bringing the whole interest to market. There was no time for delay. One course or the other must have been pursued immediately, or the property abandoned forever. If she did not elect the most judicious course for the interest of the trust, she elected the other, with the best advice of her husband, and in perfect good faith. Of this there is no doubt. I cannot but think that the charge of an abuse of discretion does not come with great weight or equity from *cestuis que trust*, who are partly representatives of the former trustees, all of whom have

been silent spectators of the manner in which the former trustees had conducted.

I shall accordingly decree, that the bill against the purchasers be dismissed with costs, and that the usual reference be made to a master to take and state an account between the representatives of Mr. and Mrs. Osgood, as executrix, on the one part, and the respective claimants of the residuary estate of W. Franklin, deceased, on the other, in taking which account, the estate of Mrs. Osgood is to be charged with the actual amount of sales and other moneys received, and no more, and the executors of John, Thomas and Samuel Franklin, deceased, to be charged with the debts due from their testators respectively, to the estate of Walter Franklin, deceased, and the question of costs, and all other questions, to be, in the meantime, reserved.

Decree accordingly.

Affirmed under the title of *Franklin v. Osgood*, 14 Johns. 527, Thompson, C. J., dissenting. Platt, J., delivering the opinion of the majority of the court, comments with approval upon the case of *Zebach v. Smith*, 3 Bin. 69 [5 Am. Dec. 352].

WHEN POWER SURVIVES.—In *Peter v. Beverly*, 10 Peters, 563, the court say: "Where there is a trust charged upon the executors in the direction to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail for want of a trustee. This is the doctrine of Chancellor Kent in the case of *Franklin v. Osgood*, 2 Johns. Ch. 19, and cases there cited; and is in accordance with numerous decisions in the English courts." The doctrine of the principal case on this subject of the survivorship of powers, is noticed and approved in *Dartmouth College v. Woodward*, 4 Wheat. 699; *Sohier v. Williams*, 1 Curtis, 488; *Taylor v. Benham*, 5 How. U. S. 269. It does not seem to be fully accepted by Cowen, J., in *Bloomer v. Waldron*, 3 Hill, 365. See on this point the note to *Bergen v. Bennett*, 2 Am. Dec. 291.

INADEQUATE CONSIDERATION AS GROUND FOR RESCISSION.—In *Jenkins v. Einstein*, 3 Biss. 137, the court says that, upon this subject, "the rule is well stated by Chancellor Kent, in *Osgood v. Franklin*," quoting the language of the principal case. The case is also cited upon this point in *Seymour v. Delancy*, 3 Cow. 516; *Mann v. Eckford's Executors*, 15 Wend. 520; *Parmelee v. Cameron*, 41 N. Y. 396; *M'argraf v. Muir*, 57 Id. 158; *McArtee v. Engart*, 13 Ill. 242; *Holmes v. Holmes*, 1 Sawy. 104; *Warner v. Daniels*, 1 Wood. & M. 110; *Lee v. Kirby*, 104 Mass. 428. Chief Justice Savage, in *Seymour v. Delancy*, *supra*, collects and comments upon the cases upon this subject. In *Bowen v. Waters*, 2 Paine, 9, the distinction made in the principal case as to whether the application is for rescission or for specific performance of the contract, is noticed with approval.

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GARDNER v. NEWBURGH.

[2 JOHN. CH. 161.]

ANCIENT WATER-COURSE, RIGHTS TO.—An owner of land has a legal right to the use of a stream of water which has flowed through it immemorially, and the violation of such right is a private nuisance.

DIVERSION OF STREAM—EQUITY JURISDICTION.—A court of equity has jurisdiction by injunction to prevent the diversion of a stream of water flowing through the plaintiff's land, although he may have a remedy at law.

TAKING PRIVATE PROPERTY FOR PUBLIC USE.—The legislature has no power to take private property for public uses, without providing for previous compensation to the owner.

SAME — DIVERTING WATER TO TOWN. — Where a statute authorized the trustees of a town to enter upon the lands of an adjoining proprietor, and take water by conduits from a spring thereon, upon making compensation to such proprietor, but omitted to provide for compensation to the owners of adjacent lands through which the stream ran, which was thereby diverted, the court granted an injunction against the diversion of such stream, until compensation should be made to the owners of such adjacent lands.

BILL for an injunction against the trustees of the town of Newburgh to prevent the diversion of a stream of water flowing through the plaintiff's land. From the bill and accompanying affidavits, it appeared that the plaintiff was the owner of a tract of land near the town of Newburgh, through which a stream of water had been accustomed to run from time immemorial, from a spring on the farm of Hasbrouck, one of the defendants. This stream was very valuable to the plaintiff, supplying him with water for his cattle and for purposes of irrigation, as well as for various domestic and economical uses, etc. On the twenty-seventh of March, 1809, the trustees of the town obtained an act of the legislature, authorizing them to go upon lands adjacent to the town, upon which there were springs of water and upon making compensation to the owners of such springs to conduct water therefrom in pipes for the use of the town. The act made no provision for compensation to those through whose lands the streams of water from such springs had been accustomed to run. Pursuant to this act the trustees obtained leave from Hasbrouck to take water from his spring. They applied to the plaintiff also for his consent to the diversion of the stream running from the spring and tendered him a small compensation, but he refused to accept it, or to allow the stream to be diverted. The bill charged, however, that the trustees, notwithstanding the plaintiff's refusal, had begun the construction

of a conduit from the spring on Hasbrouck's land, which would divert the greater part, if not all, of the stream from the plaintiff's farm, and leave him without a sufficient supply of water in the dry season.

Burr and J. V. N. Yates, for the plaintiff.

KENT, Chancellor. The statutes under which the trustees of the village of Newburgh are proceeding, secs. 32, c. 119, makes adequate provision for the party injured by the laying of the conduits through his land, and also affords security to the owner of the spring or springs from whence the water is to be taken. But there is no provision for making compensation to the plaintiff, through whose land the water issuing from the spring has been accustomed to flow. The bill charges that the trustees are preparing to divert from the plaintiff's land the whole, or the most part of the stream, for the purpose of supplying the village. The plaintiff's right to the use of the water is as valid in law, and as useful to him, as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it, and we cannot suppose it was intended he should be deprived of it, without his consent, or without making him a just compensation. The act is unintentionally defective in not providing for his case, and it ought not to be enforced, and it was not intended to be enforced, until such provision should be made.

It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a water-course is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy: F. N. B. 184; *Moore v. Browne*, Dyer, 319 b; *Luttrell's case*, 4 Co. 86; *Glynne v. Nichols*, Comb. 43; 2 Show. 507; *Prickman v. Trip*, Comb. 231.

The court of chancery has also a concurrent jurisdiction, by injunction, equally clear and well established, in these cases of private nuisance. Without noticing nuisances arising from other causes, we have many cases of the application of equity powers on this very subject of diverting streams. In *Finch v. Resbridger*, 2 Vern. 390, the lord keeper held, that after a long enjoyment of a water-course running to a house and garden, through the ground of another, a right was to be presumed, unless disproved by the other side, and the plaintiff was quieted

in his enjoyment by injunction. So again in *Bush v. Western*, Prec. in Ch. 530, a plaintiff who had been in possession, for a long time, of a water-course, was quieted by injunction, against the interruption of the defendant, who had diverted it, though the plaintiff had not established his right at law, and the court said such bills were usual. These cases show the ancient and established jurisdiction of this court; and the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, upon just and equitable grounds, ought to be prevented: 1 Vern. 120; *East India Co. v. Sandys*, Id. 127; *Hills v. University of Oxford*, Id. 275; 1 Ves. 476; 2 Id. 414; *Whitchurch v. Hide*, 2 Atk. 391; 2 Ves. 453; *Attorney-general v. Nichol*, 16 Ves. jun. 338.

In the application of the general doctrines of the court to this case, it appears to me to be proper and necessary that the preventive remedy be applied. There is no need, from what at present appears, of sending the plaintiff to law to have his title first established. His right to the use of the stream is one which has been immemorially enjoyed, and of which he is now in the actual possession. The trustees set up no other right to the stream (assuming, for the present, the charges in the bill) than what is derived from the authority of the statute; and if they are suffered to proceed and divert the stream, or the most essential part of it, the plaintiff would receive immediate and great injury, by the suspension of all those works on his land which are set in operation by the water. In addition to this, he will lose the comfort and use of the stream for farming and domestic purposes; and, besides, it must be painful to any one to be deprived, at once, of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling. A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised "but by lawful judgment of his peers, or by due process of law." This is an ancient and fundamental maxim of common right to be found in *Magna Charta*, and which the legislature has incorporated into an act declaratory of the rights of the citizens of this state: *Laws*, sess. 10, c. 1.

I have intimated that the statute does not deprive the plaintiff of the use of the stream, until recompense be made. He

would be entitled to his action at law for the interruption of his right, and all his remedies at law and in this court remain equally in force. But I am not to be understood as denying a competent power in the legislature to take private property for necessary or useful public purposes; and, perhaps, even for the purposes specified in the act on which this case arises. But to render the exercise of the power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.

Grotius, *De Jur. B. & P.*, b. 8, c. 14, s. 7, Puffendorf, *De Jur. Nat. et Gent.*, b. 8, c. 4, s. 7, and Bynkershoek *Quæst. Jur. Pub.*, b. 2, c. 15, when speaking of the eminent domain of the sovereign, admit that private property may be taken for public uses, when public necessity or utility requires it; but they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. The last of those jurists insists, that private property cannot be taken on any terms without consent of the owner for purposes of public ornament or pleasure; and he mentions an instance in which the Roman senate refused to allow the prætors to carry an aqueduct through the farm of an individual against his consent, when intended merely for ornament. The sense and practice of the English government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the legislature. And how does the legislature interpose and compel? "Not," says Blackstone, 1 Com. 139, "by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform."

I may go further and show that this inviolability of private property, even as it respects the acts and wants of the state, unless a just indemnity be afforded, has excited so much inter-

est, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government. Such an article is to be seen in the bill of rights annexed to the constitutions of the states of Pennsylvania, Delaware and Ohio; and it has been incorporated in some of the written constitutions adopted in Europe (constitutional charter of Louis XVIII., and the ephemeral, but very elaborately drawn, constitution *de la Republique Francaise* of 1795). But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the United States, "that private property shall not be taken for public use, without just compensation." I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property; and I am persuaded that the legislature never intended, by the act in question, to violate or interfere with this great and sacred principle of private right. This is evident from the care which this act bestows on the rights of the owners of the spring, and of the lands through which the conduits are to pass. These are the only cases in which the legislature contemplated or intended that the act could or should interfere with private right, and in these cases due provision is made for its protection, or for compensation. There is no reason why the rights of the plaintiff should not have the same protection as the rights of his neighbors; and the necessity of a provision for his case could not have occurred, or it doubtless would have been inserted. Until, then, some provision be made for affording him compensation, it would be unjust, and contrary to the first principles of government, and equally contrary to the intention of this statute, to take from the plaintiff his undoubted and prescriptive right to the use and enjoyment of the stream of water.

In the case of *Agar v. The Regents' Canal Company*, Cooper's Eq. R. 77, an injunction was granted on filing a bill supported by affidavit, restraining defendants acting under a private act of parliament from cutting a canal through the land of the plaintiff in a line and mode not supposed to be within the authority of the statute. I shall accordingly upon the facts charged in the bill, and supported by affidavits, as a measure immediately necessary to prevent impending injury, allow the injunction, and wait for the answer to see whether the merits of the case will be varied.

Injunction granted.

PROPERTY IN WATER.—The right to the use of water is a right of property depending on the ownership of the land over which the water flows, and is very readily deduced from the principle well established in our law that one who owns the soil owns from the center of the earth to the heavens, as expressed in the well known maxim, "*Cujus est solum ejus usque ad cælum, et ad infernos.*" It has been sometimes asserted that water should be regarded as air, *publici juris*, and that it should not, therefore, be capable of exclusive appropriation, or become the subject of a private right. Blackstone is supposed to give countenance to this idea: 2 Com. 14. But the distinction, he claimed, is a good one, and is now recognized, by all who regard it in the nature of property; it is, that a right to the use of running water, or a right of property in it, is not quite as exclusive or as extensive as a right of property in land or in chattels. It is a qualified right; a right which must be reasonable, and with a regard to the rights of other riparian owners. This right is limited by the rule expressed in the maxim, "*Aqua currit et debet currere ut currere solebat.*" The nature and foundation of the right is well set forth in Angell on Water-courses, sec. 5, where he says: "The right of private property in a water-course is derived as a corporeal right or hereditament from or is embraced by the ownership of the soil over which it naturally passes. The well known maxim, *cujus est solum ejus est usque ad cælum* inculcates that land in its legal signification has an indefinite extent upwards, and therefore it is that a grant of it conveys to the grantee not only the 'field' or the 'meadow,' but all growing timber and water standing and being thereupon, and a stream of water is therefore as much the property of the owner of the soil over which it passes, as the stones scattered over it."

The same exposition of the right is well expressed in *Cary v. Daniels*, 5 Met. 236, by Wilde, J., who says: "The right which a party has to the use of water flowing over his own land is undoubtedly identified with the realty, and is a real or corporeal hereditament, and an easement, or a predial service as defined by the civil law. And it is immaterial whether the water-course be natural or artificial; or whether the right is derived *ex jure nature* or by grant or prescription." The assertion made in some cases, that a riparian owner has no property in the water itself, but merely a simple usufruct as it passes along, is misleading; for if carried out in its logical consequences, it would follow that the owner of land, who does not make use of a stream flowing through it, would not have his rights materially infringed in case the water was diverted or diminished by another. This doctrine is admirably controverted in an able opinion by Lewis, C. J., in *Vansickle v. Haines*, 7 Nev. 249. Speaking of the nature of the right, he says: "We do not wish to be understood as saying that there is such an absolute property in the water that the whole stream may be destroyed by a riparian proprietor, so that others below him will be deprived of it; but that it is an incident of his land to the extent that he has the right to have it continue to flow in its natural course, subject to such changes only as may be occasioned by such use of it as the law allows the various proprietors to make, as it passes along, and which will be hereafter more fully explained. In this sense only is the right to be understood, when spoken of in the authorities about to be quoted."

Further on he says: "The whole argument on this point evidently originates out of an utter misunderstanding of what is meant by the court, when it is said that the riparian proprietor 'has no property in the water itself, but simply a usufruct while it passes along.' The very reason given for this statement shows that the riparian proprietor has a right beyond that which

is claimed by counsel; it is this: that as each proprietor has a right to the flow of the stream through his land as it was wont to, as it is the common property of all the owners of the soil through which it passes, no one of them can have such a property in the water as will entitle him to consume or divert it all from those on the stream below him, as he might do if he had an absolute property in the water itself; hence the expression so often used. It is, however, never employed as limiting the entire right of the riparian proprietor to the mere use of water; he has another right, and one which is universally admitted: that is the right to have the stream continue to flow through his land, irrespective of whether he may need it for any special purpose or not. He has the right to the natural benefit which a stream affords, independent of any particular use, for the fertility which its natural flow imparts to the soil. In other words, his right has a double aspect; first the right of having the course of the stream continued through his land, which is absolute and complete, as against all the world; and, secondly, the right to make such use of the water as it passes through his land, as will not damage those who are located on the same stream, and are entitled to equal rights with himself." The doctrine of a property in water, is here clearly stated with its limitations, and is fully supported by the current of authorities. At one time, in England, it was understood that there must be some substantial damage suffered by a riparian owner, before he could have a right of action for the diversion, or diminution of water running through his land; and if he made no beneficial use of it, he was not damaged: *Williams v. Morland*, 2 B. & C. 908; but Denman, C. J., in concluding his judgment in *Mason v. Hill*, 3 B. & Ad. 312, says: "It must not be considered as clear that an occupier of land may not recover for the loss of the *general benefit* of the water, without a special use or a special damage shown." So, in *Pugh v. Wheeler*, 2 Dev. & Bat. 50, it is held that every riparian proprietor necessarily and at all times is using the water running through it, if in no other manner, in the fertility it imparts to his land, and the increase in the value of it: See Angell on Water-courses, sec. 427; 3 Kent's Com. 439; *Elliott v. Fitchburgh R. R.*, 10 Cush. 193; *Jackson v. Jordan*, 2 Met. 239; *Davis v. Fuller*, 12 Vt. 190; *Corning v. Troy Nail Factory*, 40 N. Y. 191, citing the principal case; *Tillotson v. Smith*, 32 N. H. 90; *Shamleffer v. Council Groves Co.* 18 Kan. 24.

An exceptional right to running water is recognised in the Pacific states and territories on the ground of a policy for the promotion of mining industry: *Basey v. Gallagher*, 20 Wall. 670.

LIMITATIONS OF RIGHT.—The rule generally laid down to determine the extent of the right which a riparian owner has to water passing through his land is that he must have a reasonable use of it for irrigation and domestic purposes: *Snow v. Parsons*, 28 Vt. 459; *Hayes v. Waldron*, 44 N. H. 580; *Springfield v. Harris*, 4 Allen, 494; *Davis v. Getchell*, 50 Me. 602; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Pitts v. Lancaster*, 13 Met. 156. And this reasonable use is a question of fact: *Snow v. Parsons*; *Hayes v. Waldron*, *supra*. The exercise of the right and its limits are well expressed in a late case in Maryland, *Mayor v. Appold*, 42 Md. 442, where the court say: "The right of every riparian owner to the enjoyment of a stream of running water, in its natural state, in flow, quantity and quality, is too well established to require the citation of authorities. It is a right incident and appurtenant to the ownership of the land itself, and, being a common right, it follows that every proprietor is bound so to use the common right as not to interfere with an equally beneficial enjoyment of it by others. This is the necessary result of the equality of right among all the proprietors of that which is common to

all. As such owner he has the right to insist that the stream shall continue to run *et currere solebat*, that it shall continue to flow through his land in its usual quantity at its natural place, and at its usual height. Without a grant either express or implied, no proprietor has the right to obstruct, diminish, or accelerate the impelling force of a stream of running water. Of course we are not to be understood as meaning there can be no diminution or increase of the flow whatever, for that would be to deny any valuable use of it. There may be, and there must be allowed to all of that which is common, a reasonable use, and such a use, although it may, to some extent, diminish the quantity, or affect in a measure the flow of the stream, is perfectly consistent with the common right. The limits which separate the lawful from the unlawful use of a stream, it may be difficult to define. It is, in fact, impossible to lay down a precise rule to cover all cases, and the question must be determined in each case, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts. It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others."

Substantially the same doctrine is held in a late English case: *Swindon Water Works v. Wills Nav. Co.*, 7 H. L. 697; S. C., 14 Eng. Rep. 86, where Lord Chancellor Cairns says: "Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner, also, to use the water for all ordinary purposes, namely as has been said *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted, and may cease to come down by reason of that use. But further, there are uses, no doubt, to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes, connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water."

In *Acquackanonk Water Co. v. Watson*, in the court of appeals of New Jersey, March, 1878 (see Reporter, vol. 6, p. 311), it is said: "The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water." And it is conceded he may use it for domestic, agricultural and manufacturing purposes.

To work an injury, therefore, in the use and enjoyment of the right there must be a substantial, and material injury to the right of a co-riparian owner: *Wheatley v. Chrisman*, 24 Pa. St. 298; *Elliot v. Fitchburg R. R.*, 10 Cush. 191; *Wadsworth v. Tillotson*, 15 Conn. 366; *Gillett v. Johnson*, 30 Id. 180; *Chatsfel* 1

v. *Wilson*, 31 Vt. 358; *Gerrish v. New Market Co.*, 30 N. H. 478; *Dilling v. Murray*, 6 Porter, Ind. 324; *Union Mining Co. v. Ferris*, 2 Sawyer, 176, an instructive case, where the elements that enter into an inquiry of reasonable use are well stated. It has been held in England that a riparian proprietor has a right to the ordinary use of the water for domestic purposes, whatever the effect upon those below him: *Miner v. Gilmour*, 12 Moore P. C. 131; *Nuttall v. Bracewell*, L. R. 2 Ex. 1.

A material injury has been held to result to a riparian owner, where another detained the water certain hours each day: *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; where the water had been permanently diverted: *Tillotson v. Smith*, 32 N. H. 90; *Chatfield v. Wilson*, 27 Vt. 358; *Corning v. Troy Nail Factory*, 40 N. Y. 191, 204; *Parker v. Griswold*, 17 Conn. 288; *Oregon Iron Co. v. Trullenger*, 3 Oregon, 1; and where ice was cut as fast as formed: *Mill R. Manfg. Co. v. Smith*, 34 Conn. 462.

SUBTERRANEAN WATERS.—By many cases the right to drain subterranean waters not flowing in fixed channels, although feeding a spring or stream, is maintained: *Chasemore v. Richards*, 7 H. L. 349; 5 H. & N. 982; *Frazier v. Brown*, 12 Ohio St. 294; *Bliss v. Greeley*, 45 N. Y. 671; *Clark v. Conroe*, 38 Vt. 469; *Wheatley v. Baugh*, 25 Pa. St. 528; *Buffum v. Harris*, 5 R. I. 243; *Greenleaf v. Francis*, 18 Pick. 117; *Taylor v. Welch*, 6 Oregon, 198; *Chase v. Silverstone*, 62 Me. 175. See Angell on Water-courses, sec. 109 *et seq.*, where this subject is exhaustively examined. In *Basset v. Salisbury Mfg. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 Id. 439; *Gillham v. Madison County R. R.*, 49 Ill. 484, a different doctrine is expressed.

EMINENT DOMAIN—COMPENSATION.—The principle laid down in this case that, independent of a statutory provision, the legislature has no right to appropriate private property without previous compensation to the owner, has met with the unqualified approbation of our courts, and on this point the case is frequently cited: *McCauley v. Weller*, 12 Cal. 529; *Charles River Bridge v. Warren Bridge*, 7 Pick. 471; *Hatch v. Vermont, etc., R. R.*, 25 Vt. 68; *Charles River Bridge v. Warren Bridge*, 11 Peters, 638; *Eaton v. Boston, etc., R. R.*, 51 N. H. 521; *Pumpelly v. Green Bay Co.*, 13 Wall. 178. On this point Cooley, Con. Lim. 560, says: "The time when the compensation must be made may depend upon the peculiar constitutional provisions of the state. In some of the states, by express constitutional direction compensation must be made before the property is taken * * * * When the property is taken directly by the state, or by any municipal corporation by state authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain, that it should provide for making compensation before the actual appropriation." In accordance with this doctrine, see *Lowerre v. Newark*, 38 N. J. L. 151.

EQUITY JURISDICTION.—The right to an injunction where private property is appropriated without compensation is maintained on the authority of this case in *Pumpelly v. Green Bay Co.*, 13 Wall. 178; *Olmstead v. Loomis*, 9 N. Y. 428; *Corning v. Troy Nail Factory*, 40 Id. 207; 2 Story Eq. Juris. sec. 927.

PHILLIPS v. THOMPSON.

[2 JOHN. CH. 418.]

COLLATERAL SECURITY TO INDORSER.—Collateral security given by the maker to the indorser of a note for his indemnity inures to the benefit of the holder.

ASSIGNMENT OF SECURITY TO HOLDER.—Where an indorser of a note having taken collateral security from the maker, was not duly notified of non-payment, and afterwards assigned his security to the holder in consideration that he should be released from further liability on the note, such assignment, for the purpose of giving the holder the benefit of the security, was held to be a waiver of want of notice and a recognition of the indorser's liability.

WAIVER OF NOTICE.—A secured indorser has a right to waive the want of notice of non-payment, and rely upon his security for indemnity, and creditors of the maker of the note have no equity to object to such waiver.

SPECIFIC APPLICATION OF SECURITY.—Security given for a specific purpose must be applied to that purpose alone, and to no other.

BILL for an injunction against a sale upon execution of premises, upon which the plaintiff held a mortgage. One David Reed being indebted to the plaintiff assigned to him a bond and mortgage, dated January 1, 1813, against one O. W. Van Tuyl, for one thousand dollars, upon premises which the plaintiff supposed free from all other incumbrances. Reed had previously, however, given a judgment bond to Deforest and Osborn, upon which judgment was entered July 2, 1812, for four thousand dollars, to secure them against their indorsement of a certain note to Isaac Bronson, upon which the defendant was prior indorser. The note was several times renewed, and was in January, 1814, protested for non-payment, but no notice was given to Deforest and Osborn. Deforest and Osborn subsequently assigned their judgment against Reed to Bronson, the payee of the note, in consideration that he would release them from further responsibility. The defendant having taken up the Reed note, Bronson assigned the said judgment to him. The defendant was also the owner of another judgment against David Reed and Henry Reed, for four thousand five hundred dollars, entered March 19, 1814, on a judgment-bond given by the said D. and H. Reed to the defendant to secure him against responsibilities incurred for them. Executions were issued upon both these judgments; and besides other sums raised on the second judgment, there was made upon a joint sale of property under both executions the sum of two thousand four hundred and thirty-four dollars. The exe-

cution upon the judgment of July 2, 1812, being still unsatisfied, the defendant levied the same upon the premises included in the plaintiff's mortgage, and was about to sell said premises when the plaintiff filed his bill. Among other things it was alleged in the answer that the loan by Bronson to Reed was made upon condition that the judgment bond above mentioned should be given to Deforest, and Osborn in trust for him, Bronson, and that Deforest and Osborn acted as agents for Reed in the transaction, etc.

Biggs, for the plaintiff.

Slosson and Sedgwick, for the defendant.

KENT, Chancellor. There are two points to be considered in this case: 1. Whether the judgment assigned to the defendant was, at the time, a valid and subsisting judgment, which he was entitled in equity to enforce. And if so, then, 2. To what extent was he entitled to use it, and how far is it to be considered as satisfied by sales under it.

1. The judgment was given, as Deforest states, for the indemnity of Deforest and Osborn, as indorsers for David Reed, on a note for four thousand dollars, given by him to Isaac Bronson. The note was repeatedly renewed with the same indorsers, and the last note on which D. and O. were indorsers was payable on the eighth of January, 1814. It was not paid, and due notice of non-payment was not given to those indorsers. This fact of the want of due notice from the holder may be taken as sufficiently established. It is, then, contended that D. and O. being no longer responsible, the consideration of the judgment ceased, and it ought not to be deemed in force. But, in answer to this, it is said, there are circumstances which go to show that Deforest and Osborn are not, in equity, entitled to set up the want of notice, even if they were, in strictness of law, discharged. It is to be inferred that they knew that the note in question could not have been paid when it fell due, because they had in their possession other notes of Reed, which were intended by him to meet it, and which they refused to indorse, and because they had, all along, acted as the agents of Reed in the negotiations attending the renewal of all the preceding notes. But whether they had this knowledge or not, it was not the notice that the law required, and they were entitled to stand upon their legal rights. If, however, they were not duly fixed as indorsers, yet D. and O. might, at any time, waive the want of due notice, and take up the note. This every indorser

may do; and if he promises to pay under a knowledge of the defect of notice, he is still bound. D. and O. did not pay, or promise to pay; but they did what was tantamount. With the knowledge of the protest of the note, and of the want of notice, and after they had considered themselves exonerated, on strict legal grounds, as indorsers, they assigned to Bronson, the holder of the protested note, the judgment given to them for their indemnity as indorsers, and they assigned it, as they state in their assignment, in consideration of being released from their indorsement of the said note." This was, in effect, a waiver of the want of notice, and an admission that they were liable as indorsers. It is so reasonable, under the circumstances of this case, that the holder should not be deprived of the security resulting from their indorsement, and the judgment given to support it, that I feel inclined to consider the fact of the assignment as evidence of a promise to pay, and a promise fulfilled by means of the assignment. None of the parties to the note or the judgment can object that the judgment is made to answer for the payment of the note which Reed gave, and D. and O. indorsed. In the case of *Maure v. Harrison*, 1 Eq. Cas. Ab. 93, K. 5, and which was cited in 1 Johns. Ch. 129, a bond creditor was held entitled to the benefit of any collateral security given by the principal debtor to the person who became his security to the creditor. It is extremely just that the judgment here should be so applied; the act was not done in fraud of the plaintiff; and he has no equity to set up against any waiver, by these indorsers, of the want of notice. They had a right to pay the note, and resort to the judgment for their indemnity. They had an equal right to assign the judgment to the holder, and obtain their discharge in that way, if they thought proper. They were dealing with their own rights, and the plaintiff has no right to complain of the transaction.

I have not placed any reliance on the trust set up by the defendant, though Bronson may have considered the judgment taken by D. and O. as taken for his benefit, yet he admits there was no agreement between him and them on the subject, and D. states expressly that the judgment bond was taken on the account exclusively of D. and O., as indorsers, and for their indemnity. The bond and warrant speak that language, and no other; and I doubt very much whether parol evidence is alone sufficient to raise a trust in opposition to the language of the instrument: *Fordyce v. Willis*, 3 Bro. C. C. 577. There is

indeed an equivocal expression in the assignment which might afford color for the inference of such a trust, but that is not sufficient when we consider the positive testimony of D., and the admission that D. and O. made no such agreement when they took the bond. They took it on their own account, without any intention or knowledge of being trustees.

2. The next point respects the use which the defendant is entitled to make of that judgment. It was given for a specific purpose, and to that purpose, exclusively, it ought to be applied. It is held only to secure the payment of the note which fell due on the eighth of January, 1814. The defendant admits that there have been large sales of the property of D. Reed under that judgment, and under a subsequent judgment of the defendant against D. and H. Reed, and which last judgment was given to cover all the extensive responsibilities of the defendant. The sales by virtue of the executions under both judgments were made on the twenty-fifth of November, 1814, and the defendant, in his further answer, admits that the sales which took place at that time were under both judgments, and that the money raised amounted to two thousand four hundred and thirty-four dollars. The sales were under both judgments indiscriminately, but as the judgment assigned to the defendant was the elder judgment, and given for a specific object, he ought to have applied the moneys so raised to the discharge of that judgment. If he were to be permitted to sell under both judgments without discrimination, and then to apply the proceeds to his responsibilities at large, the elder judgment might be diverted to purposes foreign from its object, and be made a mask to cover claims over which an intervening incumbrance has a preference. The fair and just rule in this case will be to satisfy the judgments out of the proceeds of the joint sale, according to the order of priority, and then each incumbrance will have its due force and effect. The defendant has raised, under the first judgment, two thousand four hundred and thirty-four dollars, provided all the moneys raised by the indiscriminate sales under both judgments be applied to that judgment. Whether the moneys have been so credited or not, they ought to be, and the judgment assigned be held to answer only for the residue of the four thousand dollars, with interest, after crediting the two thousand four hundred and thirty-four dollars, from the time of the sale. I do not perceive the propriety of going further, or of interfering with the moneys previously raised under the second judgment, or of requiring the note to be

actually paid up by the defendant, before he collects the amount of it. The judgment was taken by Bronson, and assigned by him to the defendant, as a satisfaction of the note which the defendant, as prior indorser, took up, and the defendant gave a judgment bond to Bronson for the whole amount of it.

Whether there will be any property left to satisfy the plaintiff's mortgage after the residue of the debt due to the defendant is raised cannot be known. The defendant, however, is entitled to go on and raise it; and I shall accordingly dissolve the injunction so far as to allow the defendant to collect the balance due him, as aforesaid, unless the plaintiff shall elect to pay that balance, and take an assignment of the judgment.

Decree accordingly.

ADSIT v. ADSIT.

[2 JOHN. CH. 448.]

LEGACY IN LIEU OF DOWER.—A pecuniary legacy to the testator's wife will not be held to be in lieu of dower, unless it is so expressed in the will, or unless the testator's intention that it should be so considered can be deduced from the terms of the will by clear and manifest implication, so that the allowance of dower would, in effect, defeat or disturb the will.

ITEM.—Where a testator gave his wife, in addition to the necessary household goods, a legacy of five hundred dollars "to be left in the hands of his executors, to be paid to her for her support, at any time, or at all times, as her need might require," and, after bequeathing sundry legacies to other persons, directed his executors to sell the real estate, etc., and to pay the money, as they might think proper, to the legatees, the wife's legacy, which was inferior in value to the dower, and which was in fact paid out of the proceeds of the real estate, was held not to be in lieu of dower.

ACCEPTANCE OF LEGACY.—Acceptance, by a widow, of a legacy given in lieu of dower, does not bar her right of election, unless made with full knowledge of the consequences.

BILL for an injunction to stay an action to recover dower. Samuel Adsit died in April, 1806, seised of a certain farm. By his will he gave to his wife, the defendant, five hundred dollars, "to be left in the hands of his executors, to be paid to her for her support, at any time, and at all times, as her need might require." He gave her also what household goods she might need. There were further legacies to the grandchildren of the testator, of whom the plaintiff was one, and a direction that, after payment of all debts and legacies, the "residue" should be divided equally among the testator's children and grandchildren. The will further directed the executors to sell the

movables as soon as convenient, and to sell the farm in one year, and pay the money to the legatees, as they, the executors, might think proper. At the death of the testator the plaintiff was in possession of the farm under a lease, and under an agreement for a conveyance upon the payment of six thousand dollars within one year after the testator's decease. The plaintiff paid the money and received a conveyance from the executors April 11, 1807. The personal estate being barely sufficient to pay the debts, the legacies, including that to the wife, were paid out of the proceeds of the farm. The defendant claimed that when the conveyance was made to the plaintiff and also when the legacy was paid to her, she stated that she intended to insist upon her right of dower, if necessary. She afterwards brought her action to recover her dower, whereupon the plaintiff filed this bill. The case was heard upon a motion to dissolve the injunction upon the filing of the answer.

H. Bleecker, for the defendant, in support of the motion, contended upon the merits, that the widow's right to dower was not barred by her acceptance of the legacy under the terms of this will, and cited Co. Lit. 6, note 227 by Hargrave; 1 Johns. 307 [3 Am. Dec. 333]; 2 Vern. 365; 1 Ld. Raym. 438; 8 Mod. 152; Ambl. 682; 8 Vin. Ab. 366; Prec. in Ch. 133; 1 Bro.; C. C. 292 2 Id. 347, 362; 3 Woods, 493; 3 Ves. 149.

J. Talmage, *contra*, objected to the motion, at this time, as the cause was at issue, and parol proof had been taken which was not before the court.

KENT, Chancellor. This is a motion to dissolve the injunction on the coming in of the answer. The question on the will is, whether the defendant is entitled to her dower, as well as to her legacy; if not, then, whether she is entitled to her election, notwithstanding a considerable part of the legacy has been received. I am not prepared to say what effect parol proof may have on this question, and, therefore, I shall give the plaintiff an opportunity to bring the cause to a hearing before I dissolve the injunction; but I have no difficulty, in the meantime, in saying that there does not appear to be anything in the will itself to bar the widow, or to put her to her election.

If the legacy is to be taken in lieu of dower, I should think that the defendant is entitled to her election, notwithstanding her acceptance of the legacy; for it is evident that she did not, in that case, act with a proper understanding of the conse-

quence of that acceptance, but was under mistaken impressions: *Wake v. Wake*, 1 Ves. jun. 335.

The legacy is not declared, by any express words in the will, to be in lieu of dower. The inquiry, then, is whether such an intention in the testator is to be collected by clear and manifest implication from the provisions in the will. To enable us to deduce such an implied intention, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will. This appears to be the result of an historical review of the cases upon this greatly agitated subject. According to this test, the defendant is entitled to her dower as well as to the legacy; for every bequest can take effect, and every disposition of the will be fulfilled, consistently with the operation of the claim of dower. The direction given in the will, to sell the farm, is not, of itself, a circumstance that is to alter this construction; for it is well understood that the purchaser takes the estate subject to that claim. The title to dower is paramount to the testator's title, and he has no control over it. All the cases, however irreconcilable they may be in other respects, agree in this, that a devise of the lands to trustees to sell, or a direction to the executors to sell, is understood to pass the estate subject to dower. There is no inconsistency between the execution of such a power and the claim of dower. There is no pretense even of hardship in this case upon the testator's grandson, who now comes forward to repel the claim, because the purchase of the farm was in pursuance of a contract made with the testator, and for a price agreed on, long before he made his will. The parties must have understood the contract as referring only to the testator's right, and that the land would pass *cum onere*, or subject to the well-known contingency of dower.

The bequest of a sum of money to the wife is never admitted to be, of itself, and unconnected with other circumstances, a substitute for dower. It is considered a voluntary gift, and does not affect her legal rights. Every devise or bequest imports bounty, and does not naturally imply satisfaction of a pre-existing incumbrance. But there is one expression in the will which may seem to mark a design in the testator to give the five hundred dollars in lieu of dower, and that is the declaration that it was to be paid her for her support.

If this contains sufficient evidence of a clear, unambiguous intention in the testator to substitute that legacy for the dower,

then the defendant ought to be put to her election; for if she takes a benefit under the will she must conform to it in all respects, as far as she is able. It would be unconscientious in the wife to take the dower and also what the testator intended to be in lieu of it. The great point here is, does the gift of the five hundred dollars furnish clear and undoubted evidence of such intention? May not this sum have been intended as auxiliary support, and not as an entire and only provision for her maintenance? It was a provision far inferior in value to her dower. It was a very inadequate support for her during life. The sum is not given absolutely, out and out, but is to be left in the hands of the executors, and to be paid to her as her need might require. The better opinion is that it was intended as a mere gratuity, or as a cumulative provision, and created for greater caution. A well rooted and anxious affection would naturally have made this small pecuniary provision for the better comfort of an aged wife, without any intention of depriving her of her more ample and valuable common law resource. The fact that the testator gives her also the requisite household goods, shows that he contemplated her ability and perhaps desire to live by herself. I cannot find in this bequest evidence sufficient to satisfy my mind of a certain or manifest intention that it should be in lieu of dower; and the acceptance of it is not inconsistent with the claim of dower, nor is the assertion of that claim repugnant to or destructive of any provision in the will.

The weight of the authorities applicable to this case is decidedly in favor of the widow's claim to dower, notwithstanding the bequest. In *Lawrence v. Lawrence*, 2 Vern. 865; 1 Eq. Cas. Ab. 218, 219, the testator devised some personal legacies to his wife, and also devised to her part of his real estate, of the yearly value of one hundred and thirty pounds, during her widowhood, and the remainder of his whole estate he devised to the plaintiff. It was held by Lord Chancellor Somers that though what was given to the wife was not declared to be in lieu of dower, yet it might be plainly collected from the will that it was so intended, because the testator devised all other his real estate to other uses; and he held the widow to her election between the dower and the devise.

It is to be observed that the lord chancellor put the case upon a plain intent to substitute the provisions in the will for the dower. Whether he was or was not mistaken in his inference, yet the ground he took was correct, in requiring a manifest intention to bar the dower. That case was also much stronger

than the present, for there was not only a pecuniary bequest, but a devise of an interest in the land. But this decree of Lord Somers was afterwards, on a rehearing before Lord Keeper Wright, in 1702, reversed, because it did not appear that the testator intended to bar the wife of her dower. The same point, under the same will, in 1715, came before Lord Chancellor Cowper, who concurred in opinion with the lord keeper; and that last decree was affirmed, on appeal to the house of lords: 1 Bro. P. C. 591.

The next case, in the order of time, was that of *Hitchin v. Hitchin*, Prec. in Ch. 133; 2 Vern. 403. The testator devised certain lands to his wife for life, without saying more, and devised the residue of his lands to other purposes. The decision of Lord Somers in *Lawrence v. Lawrence*, which was made the year before, was urged against the widow's claim of dower in the lands devised to others, and that decision had not then been reviewed and reversed. But the lord keeper held that the devise was not to be looked upon as any recompense or bar of dower, but as a voluntary gift. *Lemon v. Lemon*, 5 Geo. I., 8 Viner, 336, pl. 45, the testator devised lands to his wife for life, which were of more value than her dower, but not devised to her expressly in lieu of dower; and he devised other lands to his brother, in which the widow claimed her dower. Lord Chancellor Parker, on the strength of the case of *Lawrence v. Lawrence*, as settled in the house of lords, held that the widow was entitled to her dower, notwithstanding the devise.

These several cases established the rule, that not merely a pecuniary bequest, but even a devise of lands, though for life, and though of greater value than her dower, was not to be taken in bar of dower, unless so expressed. Lord Camden admitted that these cases were good law, because the will in all those cases was consistent with the claim of dower. The dowable estate was devised generally, and passed *cum onere*. But since those decisions, a very interesting discussion has arisen and been continued through several of the cases, on the effect of an annuity given to the wife for life, and charged upon the dowable estate.

Lord Hardwicke appears to have considered the annuity as no bar, according to the imperfect note of the case of *Pitts v. Snowden*, cited in App. to 1 Bro. C. C.; in 2 Ves. jun. 579; and 3 Id. 252. The testator gave his wife an annuity of fifty pounds, chargeable upon the lands upon which dower was sought; with a power of entry and distress, and which lands he devised to

his children, and the widow was held entitled to both. But in *Arnold v. Kempstead*, Amb. 466, a contrary decision seems to have been made. In that case, the testator gave his wife certain leasehold houses for life, and an annuity of ten pounds during widowhood, and then disposed of all his freeholds, subject to that annuity. Lord Chancellor Northington considered that here was a manifest intention of the testator to give the annuity in satisfaction of dower, as the lands were devised subject to that annuity, and the claim of dower would be in contradiction to the will.

The general doctrine in this case was perfectly sound, whatever may be thought of its application. The case of *Lawrence v. Lawrence*, as finally settled, was admitted to be the rule; but here the intention was held to be manifest, and the claim of dower in contradiction to the will. The case of *Villaval v. Gahway*, Amb. 682; S. C., 1 Cruise's Dig., tit. Dower, c. 5, s. 83, was decided soon after by Lord Camden, by whom all the cases were ably examined, and he went largely into the argument, to show that the annuity was inconsistent with the claim of dower. In that case, the will gave the wife an annuity of two hundred pounds, with a power of entry and distress; and subject thereto, he devised his estates in trust for his daughter. The lord chancellor followed the case of *Arnold v. Kempstead*, and, in opposition to that of *Pitts v. Snowden*, held that a rent charge given to the widow, issuing out of the estate, subject to dower, and with power of distress, was a bar of dower, because such a claim would disappoint or disturb the will, and be inconsistent with it. As an annuitant, the widow must be out of possession of the whole land, and as dowress she must be in possession of part. The trustees could not hold the whole subject to the annuity and distress, without being in possession of the whole; and they were to hold the whole in trust, and for the widow, as an annuitant. But the claim of dower would put her in possession of a part, and sink so much of the annuity; whereas the very gift of an annuity, chargeable upon the real estate, does from the nature of the interest throw her out of possession; and by this course of reasoning, the chancellor undertook to prove that the claim of dower was inconsistent with the will, and that the acceptance of the annuity barred the dower. In *Jones v. Collier*, Amb. 830, decided by Sir Thomas Sewell, as master of the rolls, these two latter decisions on the effect of an annuity to bar dower in the lands on which it is charged, were followed. So also Mr. Justice Buller,

when sitting for the lord chancellor, in *Wake v. Wake*, 3 Bro. C. C. 255; 1 Ves. jun. 335, followed the same decisions, on the same question.

In the subsequent cases it would appear, however, that even this doctrine of holding the wife barred by an annuity charged upon the real estate, is questioned and shaken, and finally overruled. Thus in *Pearson v. Pearson*, 1 Bro. C. C. 292, land was devised to the son, subject to an annuity to the wife, and the question was whether this rent charge to the wife was a bar of her dower, without being so expressed. Lord Rosslyn held the law to be settled, that the gift of an annuity to the wife, might or might not be a bar, according to the language of the will. If the value of the land should not be sufficient to satisfy the annuities and the dower, it would prove an intention to bar the dower, otherwise, there was nothing in the will to show such an intention, and the cause stood over to inquire into the value of the land; and it was agreed that if it was not sufficient to satisfy both, the widow must elect. Again, in *Brown v. Perry*, Dickens, 685, according to a short and imperfect note of the case, Lord Ch. Thurlow restored, in full vigor, the efficacy of the ancient authorities. The testator devised to his wife some particular estates for life, and also bequeathed her specific parts of his personal estate, and he held that she was not barred by the acceptance of the devise and bequest. The law gave her dower, and what her husband gave her was an addition. In *Foster v. Cook*, 3 Bro. C. C. 347, Lord Thurlow held that even an annuity to the wife for life, and charged upon the real estate, in the hands of trustees, was no bar of dower, which was paramount to the will. This was in direct contradiction to the cases already mentioned in favor of the bar arising from the annuity; and it is the more striking, as these cases were cited by the counsel and pressed upon his lordship's attention. The decisions of Lord Hardwicke, and of Lord Thurlow, are thus placed in direct opposition to the intermediate decisions on this point of the annuity.

In the recent cases, this whole subject has received a further investigation, and they will be found to be extremely interesting on this greatly litigated rule of construction. The case of *Straham v. Sutter*, 3 Ves. 249, came before Lord Alvanley as master of the rolls. There was a devise to the wife of twenty guineas "for her immediate support and maintenance," and an annuity during her widowhood, and a gift also to her of the household furniture, and the testator's stock in trade. He de-

vised his real estate to his son, and directed the rents and profits to be applied to his education. This case is considerably analogous to the one now before me, and I think, would afford a much stronger inference against the right to dower. Lord Alvanley held that the claim of dower was not inconsistent and irreconcilable with the devise to the son, and that it was not a necessary inference that the testator intended that the devisee should take it unincumbered by the dower of the wife. The annuity in this case was not charged upon the premises of which the wife was dowable; and, therefore, it was not exactly like the cases in *Ambler*. The gift of an estate out of which the widow was dowable, did not prevent her from taking any other estate the testator thought proper to give her, and he recognized the authority of the elder cases, by which the gift of an estate to a third person did not exclude the wife from claiming dower out of it. He concluded that the widow in this case was not barred. In *French v. Davies*, 2 Ves. jun. 572, Lord Alvanley had previously gone still more minutely into an examination of all the cases on the subject. A devise of all the estate was made to the wife and others, in trust to sell, and great benefits were given to the wife out of the proceeds. This presented a very strong case in support of the inference, that the testator meant to bar the dower, but he ruled otherwise. In the three cases from *Ambler*, the demand of the annuity was out of the same estate as the dower, but here the claim was out of a fund composed of the produce of the real and personal estate mixed together; and the master of the rolls held that merely directing the estate to be sold was not a bar, for the wife might take her dower out of the purchase-money. He did not, therefore, expressly contradict the authority of the cases in *Ambler*, though he evidently would have done so, if necessary, by preferring, as he did, the old and the modern cases, which were irreconcilable with those intermediate decisions. It appeared to him that here was no manifest and certain intent to bar the dower, though he believed the husband would have imposed such a condition if he had recollected the dower. But the husband had not done so, and there was no clear, incontrovertible result from the will, that he meant to exclude her, no legacy would be disappointed. The dower and all the dispositions could stand together. There was no repugnancy between the dispositions in the will and the dower. The only argument was that the estate would not sell for so much as if dower was not insisted on, but that was no reason

why a person taking a legacy was to be prevented from setting up an incumbrance.

In *Greathorex v. Cary*, 6 Ves. jun. 615, the testator had given to the wife one hundred and fifty pounds a year, during her widowhood, and charged it on the real and personal estate. He also bequeathed to her his household goods, etc., and devised the residue of his estate to his sister. This brought up again the effect of the annuity on the claim of dower; and the present master of the rolls, Sir William Grant, decided the case in her favor, upon the authority of *Foster v. Cook*, and held that there was no repugnancy, and that it did not appear clearly that the testator meant so to dispose, that if she should claim dower, it would disappoint the will.

The subject was brought under the consideration of Lord Redesdale, in *Birmingham v. Kirwan*, 2 Sch. Lef. 444, and he said the clear deduction from all the cases was, that the intent to exclude the right of dower by a voluntary gift must be demonstrated by express words, or by clear and manifest implication, and this implication must arise from some provision in the will, inconsistent with the assertion of the claim. He ruled, accordingly, in the case before him, that a devise to the wife of a house and one hundred and seventy acres for life, at a low rent, and with directions to keep it in repair, was inconsistent with the assertion of a right of dower in the same lands, but not inconsistent with a claim of dower in the rest of the estate which he had devised to others; and he put the wife to her election as to the one tract, and allowed her claim as to the rest of the estate. He admitted that a devise of the house, etc., simply to trustees, might be subject to dower, but that the special directions concerning it, rendered the claim inconsistent with the dower. The dower would be inconsistent with her own title to one third; and upon the authority of the distinction in this case, the vice-chancellor of England, in *Dorchester v. Effingham*, Cooper's Eq. Rep. 319, confined the claim of dower to the residue of the estate, but disallowed it as to a part, in the case where the testator had devised a legacy to the wife of five hundred pounds, and a house and fifty-three acres, part of his real estate. He said he would not undertake to conjecture that a testator meant what he had not said, though it was probable the testator had not any intention, one way or the other, as to dower out of the rest of his estate.

I have thus reviewed the principal cases on this subject, and though many of them may not be entirely applicable, I thought

it would be useful to examine the question, on the ground of authority, in all its bearings, and to show the leading principle which uniformly pervades the cases. The result clearly is, that there is not a single case that contradicts the defendant's claim; but, on the contrary, if the question under this present will had been the one in any of those cases, there would probably not have been a moment's doubt or difficulty in the minds of any of the learned men who have bestowed such pains and talent in their discussions.

The only color that can be given to the plaintiff's claim must, then, arise from the proof which may have been taken in the cause; whether admissible, and if so, what effect it ought to have I cannot now say; and in order to have that part of the case discussed, I shall for the present deny the motion, with liberty to the defendant to renew it, if the plaintiff does not set down the cause for hearing at the next term.

Motion denied.

This case is extensively cited as an authority upon the subject of a widow's right to dower, in addition to other benefits that may be conferred on her by her husband's will. The following is selected simply as a specimen of the full indorsement which it has received from the courts of the different states: "The case of *Adsit v. Adsit* is valuable not only for its clear and forcible exposition of legal principles, but for its succinct review of the English authorities." *Van Arsdale v. Van Arsdale*, 26 N. J. L. 415. Some of the citations of the case are the following: *Adams v. Adams*, 39 Ala. 279; *Lord v. Lord*, 23 Conn. 331; *Hollowell v. Simonson*, 21 Ind. 40; *Jackson v. Churchill*, 7 Cow. 289; *O'Brien v. Elliott*, 15 Maine, 127; *Brown v. Brown*, 55 N. H. 108; *Vernon v. Vernon*, 53 N. Y. 562; *Carroll v. Carroll*, 20 Tex. 744. See, upon the same subject: *Evans v. Webb*, 1 Am. Dec. 308; *Hamilton v. Buckwalter*, Id. 350, and notes thereto. See also *Larrabee v. Van Alstyne*, 3 Id. 333.

BELKNAP v. BELKNAP.

[2 Johns. Ch. 463.]

STATUTES TAKING PRIVATE PROPERTY.—Acts authorizing invasions of the rights of property for private convenience or profit must be strictly construed.

SAME.—Under a statute authorizing the owners of swamp or bog meadow land to drain the same, and, if necessary, upon making compensation as therein provided, to "continue" their ditches through "lands adjoining," the proprietors of a tract of such land opened a ditch for the drainage of the same into a certain lake; and in order to lower the water in the lake so as to increase the fall, undertook to deepen the outlet at the other side of the lake, a mile distant, to the great detriment of mill-owners and other property holders along the line of such outlet. It was held that this was not within the authority of the act.

EQUITY JURISDICTION TO RESTRAIN PRIVATE NUISANCE.—Equity has jurisdiction, concurrent with the remedy at law, to prevent an injury to private property by interrupting an ancient water-course flowing across one's land.

BILL for an injunction to restrain the defendants from lowering the outlet of a certain lake to the injury of the plaintiffs. The opinion states the case.

S. Jones, jr., and Boyd, for the plaintiffs, cited 1 Ch. Cas. 504; 1 Bro. C. C. 588; 2 Vernon, 390; 1 Madd. Ch. 129.

Harison and Riggs, for the defendants, cited 5 Ves. 610; 7 Id. 209; 2 Vern. 711; 1 Ch. Cas. 227; 8 Ch. B. 226; 2 Atk. 144; 2 Dow, 519, 534.

KENT, Chancellor. The bill is filed to quiet the plaintiffs in the possession and enjoyment of their mills and other improvements, on the Passaic creek or outlet of the great pond, near Newburgh, and to stop the defendants from lowering the outlet. The proceedings complained of were instituted by the defendants, under the act of the ninth of April, 1804, relative to the draining of swamps and bog meadows in the counties of Orange and Dutchess; and the principal question in the case is, whether the act gives authority to interfere with the property of the plaintiffs, in the manner proposed. The design of the act was to enable any one or more of the proprietors of swamps and bog meadows to have them drained at the joint expense of all the proprietors. Most of the provisions in the act apply, therefore, exclusively to the interest of those proprietors, and do not touch the plaintiffs. When application is made to the court of common pleas, to have inspectors appointed to determine on the expediency, the plan, and the expense of draining, and to make a ratable assessment of the expense, the notice enjoined by the act is to be directed to the parties interested in the lands to be drained. The notice is "to all parties interested therein," that is, in the swamp or bog meadow. No other persons are called on to take notice of the proceeding, or to have any concern in the appointment. And when the inspectors have made their return, the proprietors may meet and choose commissioners to act in the place and stead of the inspectors, and who are then to be clothed with their powers. There is but one section under which third persons, who are not interested in the lands to be drained, can be affected by these private and *ex parte* proceedings, and here they are affected only in what appears to have been considered as a mere incidental

circumstance. The sixth section provides, that in case the inspectors shall find it necessary "to continue such ditch or ditches through lands adjoining any such tracts of swamp or bog meadow, for the purposes of draining the same more effectually, they are authorized to agree and settle with the owner or owners of such lands, for such damage as is likely, in their opinion, to be sustained by such owner or owners, by reason of such ditch, etc.; and if they cannot agree, the inspectors are to apply to the court to appoint appraisers." It is under this section that the present controversy has arisen.

The inspectors have reported a plan for draining the swamps north and south of the great pond, and have, in their map, laid down the course of a main ditch through each swamp and terminating at the pond. This pond, which is designated on the map as the great pond, is a mile and a half long, and one mile broad, and on an average, thirteen feet deep, and covers four hundred acres of land. The ditches terminating at the pond will not, it seems, answer the purpose of draining the swamps, on account of the elevation of the water; and the inspectors accordingly propose to lower the pond very materially, by cutting down the outlet of it, by a ditch ten feet deep, and sixteen feet wide. The plaintiffs allege, and have gone largely into proof to show, that this project of lowering the pond would destroy the value of the pond and outlet, as a source of water for the use of mills below.

The defendants admit that the mill and dam at the outlet would be essentially affected; but they insist, and have gone into proof to show, that the mills of the plaintiffs lower down on the outlet would not be injured. The witnesses differ essentially in their opinion and judgment on this point. But the question of damage is not the one I am now considering. It is sufficient, for the discussion of the matter of right, that the mill and dam at the outlet must be injured, and that the lowering of the pond to the extent proposed, is an experiment deemed by many very hazardous, in respect to the future value of the outlet to all the mills that are seated upon it. The important question is: Have the defendants authority, under the sixth section of the act, to cut down this outlet? Can this properly be deemed a continuation of the main ditch through lands adjoining the swamp? The inspectors, in their report, so consider it; for they say, "we find it necessary to continue the first mentioned main ditch through lands adjoining said tract of swamp or bog, for the purpose of draining the same more effectually, viz.,

through what is called the outlet of the great pond;" and yet it appears that this outlet is at the distance of one mile from the termination of the main ditch above alluded to.

From the best consideration that I have been able to bestow on the subject, it appears to me that the inspectors have given too extended a construction to their powers under the act. To continue a line or ditch does not, in the ordinary or grammatical sense, admit of any intervening substance to break the continuity. It implies uninterrupted connection; and the ditch cannot properly be said to be continued, by terminating it at the north end of the pond, and by deepening the outlet of that pond at the southeast corner. We cannot suppose it without indulging in the same poetical fiction by which the river Alpheus was continued from Greece to Sicily: *occultas egisse vias subter mare*. The ditch was to be continued through lands adjoining, that is, through lands next to, and which touched, the swamp or bog meadow; but none of the lands of the plaintiffs adjoin the great swamp where the main ditch terminates, though they may adjoin the small or pine swamp at the south end of the pond.

If the operation of cutting down the outlet is not within the letter of the permission under the act, we are certainly not warranted, in this case, to construe the power liberally, and to extend it by equity. It is not a case that concerns the public, but one of mere private convenience and profit. The preservation of the great pond and its outlet, may be as useful to the plaintiffs as the draining of the swamps would be to the defendants, and the interest of each party has an equal claim on the protection of the government; one interest ought not to be made subservient to the other. This permission to continue the ditch through adjoining lands, without the consent of the owner, ought to be strictly construed, and not carried beyond the plain letter of the act. It is an invasion of the rights of property; and it is evident that the act could only have had in view cases of the most immaterial and trifling consequence, or the power would never have been granted with so little check.

We have seen that the plaintiffs could not have had any legal notice of the application to the common pleas, nor any agency in the appointment of the inspectors, and that the decision of the inspectors as to the necessity and course of the ditch is, at once, conclusive upon them. We are, therefore, required by justice and policy, and the soundest rules of interpretation, to confine the inspectors and their operations, as they may affect strangers who have no interests in the swamps, within the

strict and precise limits prescribed by the statute. How cautiously and guardedly are powers given, even to public officers, to lay out highways for the use of the public over private property. They are not to be laid out over cultivated grounds without the certificate of twelve freeholders that the road is necessary; nor through any orchard or garden of four year's growth without the owner's consent. Can we suppose that this act intended that these inspectors should carry their ditches where they pleased, without any regard to the improvements of others? I am entirely persuaded that the project of draining this little lake, and thereby destroying one mill, and affecting more or less all the others which are supplied by its waters, is a stretch of power never within the contemplation of the act. It would be an unreasonable and dangerous construction. The power given was supposed to be harmless. It was never intended to touch and materially injure valuable improvements on adjoining lands; much less was it intended to break up useful ancient streams, and the natural and capacious reservoirs which fed them. It is most fit, therefore, that this power should be kept within the words of the act.

If I am right in the construction of the act, then the jurisdiction of the court and the right of exercising it are equally manifest. The title of the plaintiffs to the use of the outlet is undisputed, and they, and those under whom they hold, have been in the enjoyment of that right for a great number of years. In *Finch v. Resbridger*, 2 Vern. 390, a bill was filed to quiet the plaintiff in the enjoyment of a water-course running to his house and garden, through the ground of the defendant, and the right and long enjoyment of the plaintiff appearing, the lord keeper gave effect to the bill. Again, in *Bush v. Western*, Prec. in Ch. 530, the plaintiff had been in possession of a water-course for sixty years, and the defendant interrupted it by making a cut or channel through his own lands, and a perpetual injunction was awarded; and it was agreed, in that case, to be usual to have such bills in this court in the first instance.

These cases relate to acts of interruption by private individuals; but there are other cases still more applicable, because they relate to the proceedings of persons acting under a statute. Thus, in the case of *Hush v. The Trustees of Morden College*, 1 Ves. 188, Lord Hardwicke allowed an injunction to restrain turnpike commissioners from entering on the land of the plaintiff to dig gravel, as it was not a case within their authority. The lord chancellor said he should not interpose in a

doubtful case until that doubt was removed, and the matter determined at law; but there the case was plain, and if the commissioners went beyond their jurisdiction, they were as much trespassers as private persons; and though they might be responsible at law, that would be only for a particular wrong, and the remedy would not be equal to the remedy in this court. In the late case of *Shand v. The Aberdeen Canal Company*, 2 Dow, 519, which was a Scotch case, determined on appeal in the house of lords, Lord Eldon said that if the canal commissioners exceeded their powers they became trespassers, but chancery would restrain them by injunction, and keep them strictly within the limits of their power.

The case of *Agar v. The Regents Canal Company*, Cooper's Eq. 77, is still more recent, being as late as 1815, and it shows that the jurisdiction of chancery on this subject is well settled, and in constant exercise, and that the cases maintain the most steady uniformity in their doctrine and belief. The bill, in that case, was filed by the plaintiff as owner of an estate through which the defendants proposed to make a canal, under a private act of parliament. The prayer of the bill was to restrain the defendants from carrying the canal through his garden and brick-yard, and the injunction was allowed so far as to restrain the defendants from deviating in cutting their canal from the line prescribed. The lord chancellor admitted that the plaintiff might have lain by and rested on his legal rights, and then brought trespass, but he was also at liberty to come into chancery in the first instance for a preventive remedy; and if there was any dispute as to the fact, which course the defendant ought to pursue, he would direct an issue.

These cases remove all doubt on the point of jurisdiction; and the observation of Lord Hardwicke alludes to its pre-eminence utility. This is not a case of an ordinary trespass impending, but one great and special, leading to lasting mischief, and the destruction of the estate, and tending to multiplicity of suits. There is no fact in this case to be ascertained. The whole case turns upon the construction of the act, and considering it in the light that I do, the prayer of the bill ought to be granted.

Let the injunction, therefore, against any proceedings on the part of the defendants touching the outlet in the bill mentioned be made perpetual.

Injunction continued.

ABBOTT v. ALLEN.

[2 JOHN. CH. 512.]

DEFECTIVE TITLE—PURCHASER IN POSSESSION.—A purchaser of land who is in undisturbed possession, and has received a conveyance of the same with warranty, cannot have relief in equity against payment of the purchase-money, on the ground of a defect in the title.

BILL for injunction to restrain proceedings at law for the recovery of the purchase-money of certain premises.

The bill stated in substance that one Allen, now deceased, entered into a contract to sell and convey to the plaintiff a certain farm for the sum of two thousand five hundred dollars, representing that he was the rightful owner of the same, and would give or procure the plaintiff a perfect title; that the said Allen afterwards, with his two sons, executed to the plaintiff a deed, in fee, of the premises, with full covenants, and the plaintiff thereupon entered into possession, paid one thousand dollars of the purchase-money, and executed a bond for the payment of the remainder, and a mortgage to secure the same; that the plaintiff had ever since continued in possession of the premises, and had made valuable improvements thereon, and had paid the principal and interest of the bond, with the exception of the sum of one thousand two hundred dollars, with the interest thereon, from June 1, 1813; that the title of the plaintiff was now questionable, he having ascertained, by diligent inquiry, that certain of the heirs of one Jeremiah Sabin, a former owner of the land, had a lawful claim to a portion thereof (which claim was particularly stated in the bill); that the said Allen, the plaintiff's vendor, having died, the defendant, his son and executor, had begun proceedings for the collection of the balance due on the bond, and the plaintiff prayed that such proceedings be enjoined until the defendant should either perfect the plaintiff's title, or pay him for the deficiency. The injunction having been granted, the defendant moved to dissolve the same on the facts stated in the bill.

J. Talmadge, for the defendant, cited and relied on *Bumpus v. Platner*, 1 Johns. Ch. 213.

Emott, for the plaintiff, cited Co. Litt. 384 a, note; 1 Fonb. 366; Sugden's Law of Vendors, 316; 1 Ves. 88; 3 P. Wms. 307; 18 Vin. 113 pl. 9, 10.

KENT, Chancellor. This case comes within the general doctrine declared in *Bumpus v. Platner*, 1 Johns. Ch. 213–218, that

a purchaser of land, who is in possession, cannot have relief here against his contract to pay, on the mere ground of a defect of title without a previous eviction. But, without resting on the opinion there delivered, I have again examined the question, inasmuch as the doctrine in that case was doubted by the learned counsel who opposed this motion.

If there be no fraud in the case, the purchaser must resort to his covenants, if he apprehends a failure or defect of title, and wishes relief before eviction. This is not the appropriate tribunal for the trial of titles to land. It would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment of land, and when no third person asserts, or takes any measures to assert a hostile claim, can be permitted on suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase-money, and of all proceedings at law to recover it. Can this court proceed to try the validity of the outstanding claim, in the absence of the party in whom it is supposed to reside, or must he be brought into court against his will, to assert or renounce a title which he never asserted, and, perhaps, never thought of. I apprehend there is no such practice or doctrine in this court, and that a previous eviction or trial at law is, as a general rule, indispensable. Perhaps an outstanding incumbrance, either admitted by the party, or shown by the record, may form an exception, in cases of covenants against incumbrance. Some *dicta* in the books (see *Sergeant Maynard's case*, 2 Freeman, 1, and 1 Ves. 88) seem to look to that point, but I have formed no opinion respecting it. The case of fraud is an exception, and it seems to be admitted by Mr. Butler (note, 832 to Co. Litt. 384 a.), that if the purchaser was imposed on, by any intentional misrepresentation or concealment, he may have redress here, in addition to, and beyond, his covenants. The late case of *Edwards v. McLeay*, Cooper's Eq. Rep. 308, is to this point. The purchaser, in that case, before any eviction was had, or threatened, succeeded in a bill to set aside the conveyance, and for a return of the purchase-money, but it was expressly upon the ground of fraud and imposition charged and proved, and the master of the rolls, in answer to the objection that the plaintiff was premature, inasmuch as he had not yet been evicted, and might perhaps never be, put the case on the ground of the fraud. There is no fraud charged in this case, and the bill has no such ground to support it.

If there be no fraud, and no covenants taken to secure the

title, the purchaser has no remedy for his money, even on a failure of title. This is the settled rule at law: *Frost v. Raymond*, 2 Cai. 188 [2 Am. Dec. 228], and I apprehend that the same rule prevails in equity: 1 Fonb. 366, note; *Urmston v. Pate*, cited in Sugden's Law of Vendors, 3d ed. 346, 347, and in 4 Cruise's Dig. 90, and in Cooper's Eq. 311.

In the case of *Hiern v. Mill*, 13 Ves. jun. 114, the lord chancellor observed that possession of land was no criterion of title, and that no person in his senses would take an offer of a purchase from a man merely because he stood upon the ground. The purchaser must look to his title; and if he did not it would be *crassa negligentia*. I know of no case in which this court has relieved the purchaser where there was no fraud and no eviction; all the cases that I have looked into proceed on the ground of a failure of the title, duly ascertained. Thus in the imperfect note of the case of *Picketon v. Lilecote*, 22 Eliz. cited in 21 Viner, 541, pl. 1, and sometimes referred to, process was awarded by chancery to have the purchase-money refunded; but in that case it appeared by the defendant's answer that the plaintiff could not enjoy the reversion of the copyhold which he had purchased; and in the anonymous case in 2 Ch. Cas. 19, there was previous eviction under a paramount title, but the authority of that case is questioned in a note to the case itself, and in the subsequent books which refer to it; not, indeed, in respect to the necessity of a previous eviction, which the case may be considered as assuming, but on the ground that there was no covenant against paramount titles, and that the purchaser, as to them, took the conveyance at his peril. In *Sergeant Maynard's case*, 2 Freeman, 1, referred to in the passage cited by the counsel from Viner, the lord chancellor said that there being no fraud or surprise in the case, if the party was not aided by his covenants, he would not be helped in equity; and yet the purchase-money had been paid, and a third person had made title. There are some loose *dicta*, for which, I presume, the case was referred to, but they are without any fullness of illustration, and want that precision which is requisite to give much force to them. The decision in the case is strong against the pretension of the present plaintiff; for though a third person had made title, and the plaintiff had paid his purchase-money, yet in consequence of a positive agreement with the vendor, he was rigorously denied any relief, and left to his remedy, if any, at law. So again in *Bingham v. Bingham*, 1 Ves. 126, on a bill to have purchase-money refunded on a mis-

take in title, the mistake had appeared in an ejectment at law. It appears to me that this principle pervades the cases.

The only plausible argument for the injunction is that as the plaintiff has covenants to secure his title, the interference of this court is necessary to prevent circuity of action, and that the plaintiff ought not to be compelled to pay the purchase-money, when by a suit on his covenants he might almost concurrently be enabled to recover it back again. This argument would apply to every case of mutual and independent covenants, and would prove too much; but the proper answer here is, that to sustain the injunction would be assuming the fact of a failure of title before eviction or trial at law; and which this court, as not possessing direct jurisdiction over legal titles, is not bound or authorized to assume.

This court may, perhaps, try title to land, when it arises incidentally; but it is understood not to be within its province, when the case depends on a single legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference. This was the doctrine laid down by the respondent's counsel, on appeal, in the case of *Welby v. Rutland*, 6 Bro. P. C. 575, and it appears to have been sanctioned by the court. The rule is now so understood, according to a late treatise on the principles and practice of the court of chancery (1 Maddock's Chan. 135), a work of merit and utility. This point was also discussed much at large, and emphatically laid down by Baron Wood, and not denied by the other barons, in the case of the *Attorney-general to the Prince of Wales v. St. Aubin*, 1 Wightwick's Exch. 184 to 238. The principle on which set-offs are allowed, is also inapplicable to such a case, where the demand of the one party is certain, and that of the other is not known, and cannot be ascertained, until the outstanding title, suggested to exist, has been established at law.

The plaintiff has the means of bringing the legal title to a test, whenever he pleases, by an action at law on his covenant of seisin.

It is unnecessary for me to say whether or not the injunction ought to stand, if there had been a previous eviction, or if there was an existing incumbrance which appeared to admit of no dispute. I give no opinion on either of those points, nor on a view of the case, if founded on other and special circumstances. It would be hazardous to undertake to define the limits of equitable relief, in other supposable cases of the like

kind. But, in this case, where the plaintiff now is, and for twelve years past has been, in the peaceable possession of the land, and when no adverse title is put forward by any person claiming it, nor any adverse proceeding threatened; and when we have nothing but defects of title speculatively set forth, and when the plaintiff has full covenants, to one of which he can immediately resort in the courts of law, if the vendor was not seised, I feel myself bound to say, that the defendant's remedy at law, for the residue of his purchase-money, ought not to be stayed, and that the injunction must be dissolved.

This case, with its companion case of *Bumpus v. Platner*, referred to in the opinion, is largely cited in the American courts as an authority for the well-established doctrine that a purchaser of land who has gone into possession and accepted a deed cannot have relief in equity except in cases of fraud, against payment of the purchase-money, upon a failure of title, before eviction or something equivalent thereto, but must resort to his covenants. A few of the cases in which it is cited are here given: *Yeates v. Pryor*, 11 Ark. 74; *Peay v. Wright*, 22 Id. 205; *Hunter v. Bradford*, 3 Fla. 286; *Roberts v. Woolbright*, Ga. Dec. 100; *McGehee v. Jones*, 10 Ga. 133; *Bowlin v. Pollock*, 7 T. B. Monroe, 49; *Timmings v. Shannon*, 19 Md. 315; *Vick v. Percy*, 15 Miss. (7 Sm. & M.), 268; *Green v. McDonald*, 21 Id. 13 (Sm. & M.), 454; *Guice v. Sellers*, 43 Id. 56; *Mitchell v. McMullen*, 59 Mo. 258; *Edwards v. Bodine*, 26 Wend. 114; *In re Livingstone*, 9 Paige, 445; *Hill v. Butler*, 6 Ohio S. 217; *Van Lew v. Parr*, 2 Rich. Eq. 337; *Holt v. Payne*, 3 Tex. 479; *Patton v. Taylor*, 7 How. (U. S.) 159; *Walker v. Wilson*, 13 Wis. 525. And upon the point that, if there is no fraud and the purchaser has not protected himself by taking covenants, there is no remedy, upon a failure of title, either at law or in equity, the case is cited and relied upon in *Barkhamstead v. Case*, 5 Conn. 530; *Laugherty v. McLean*, 14 Ind. 108; *Maney v. Porter*, 3 Humph. 363, and in *Hyatt v. Twomey*, 1 Dev. & Bat. Eq. 317, a similar doctrine was applied to a sale of a patent right which turned out to be invalid, under the provisions of the U. S. patent law. As to the point that courts of equity are not ordinarily the proper tribunals for the trial of title to land, the doctrine of the principal case is noticed and commended in *Devaux v. Detroit*, Harr. Ch. (Mich.) 101; *Moran v. Palmer*, 13 Mich. 370; *Apperson v. Ford*, 23 Ark. 755. In *Lowry v. Hurd*, 7 Minn. 365, upon the question of the right of a purchaser in possession to resist payment of the purchase-money, it was held that there was a distinction between the covenant of seisin and other covenants, and that, by reason of this distinction, damages for a breach of the covenant of seisin might be set up as a counter-claim by the purchaser in an action to foreclose a mortgage given to secure the purchase-money. But this distinction is repudiated in *Farnham v. Hotchkiss*, 2 Keyes (N. Y.) 15. In certain cases relief has been granted in equity against payment of the purchase-money, until the purchaser could be secured against existing incumbrances or defects in the title, where there were doubts of the grantor's solvency: See *Jones v. Stanton*, 11 Mo. 436; *Bowen v. Thrall*, 28 Vt. 385; *Woodruff v. Bunce*, 9 Paige, 443.

GILLESPIE v. MOON.

[2 Johns. Ch. 585.]

MISTAKE IN DEED—PAROL PROOF.—Equity will relieve against a mistake in a deed or contract in writing, upon satisfactory parol proof of such mistake, whether the relief is sought affirmatively by a suit to reform the contract, or by way of defense to a bill for specific performance, and this notwithstanding the fact that the mistake is denied by the opposite party.

IDEM.—Thus, where a trustee for an infant, intending to convey two hundred acres, part of an entire tract of two hundred and fifty acres, by a mistake in the description, conveyed the whole tract; in a suit brought by the *cestui que trust* after the death of the trustee, the court, upon parol proof of the mistake, decreed a reconveyance of the fifty acres erroneously included in the deed.

DEGREE OF PROOF REQUIRED.—The proof in such cases must be clear and strong, so as to establish the mistake to the entire satisfaction of the court.

ACQUIESCENCE.—Where the conveyance in which the mistake occurred was made by a trustee for an infant in 1804, and the trustee, upon discovery of the mistake, in 1806, notified the agent of the vendee that she intended to apply to the court for relief, but died in 1814, without having taken any steps for that purpose; and the *cestui que trust* brought the suit immediately after the trustee's death, it was held that the relief was not barred by acquiescence.

COMPENSATION FOR IMPROVEMENTS.—A vendee of land conveyed by mistake is not entitled to compensation for improvements made thereon after he has knowledge of the mistake, and after he has declared his intention to take advantage of it.

BILL by Gillespie and Elizabeth, his wife, to compel a reconveyance of fifty acres of land, included by mistake in a conveyance to the defendant made in 1804, by one Mrs. Mann, who held the land in trust for the said Elizabeth, then an infant. The case is sufficiently stated in the opinion.

B. Robinson and Harison, for the plaintiffs, upon the question of the admissibility of parol evidence to prove the mistake in the deed, cited Mitford's Pl. 116; 1 Ves. 317, 457; 2 Id. 316; 3 Atk. 31; 6 T. R. 631; 6 Ves. jun. 328.

Riggs and Mitchell, for the defendant, contended that parol proof of the mistake was inadmissible, particularly where the mistake was denied in the answer, and where the evidence related chiefly to alleged confessions and admissions of the defendant made thirteen years before, and cited *Jackson v. Shearman*, 6 Johns. 19; 2 Ves. 195; 6 Ves. jun. 333, 334, 339; Dickens, 295; 1 Bro. C. C. 92, 338; 1 Bl. 1202; 12 Johns. 427; 1 Johns. Ch. 343, 429, 430; *Marks v. Pell*, Id. 594, 598.

KENT, Chancellor. The bill is brought to rectify a mistake in the conveyance to the defendant, which, by an error in the description of the land, conveyed the whole lot, or two hundred and fifty acres, instead of two hundred acres, parcel of the same. The mistake is positively denied in the answer, and it is objected that parol proof of the mistake is inadmissible in opposition to the plain language of the deed and especially in opposition to the defendant's answer.

1. Assuming the parol testimony to be competent, the fact of the mistake on the part of the grantor is made out to my entire satisfaction. There are circumstances independent of the parol proof that afford pretty strong presumptive evidence of mistake. The deed to Mrs. Mann, in 1799, after mentioning the number and describing the boundaries of the lot, adds that it contains two hundred and fifty acres, more or less. The defendant lived on part of the lot and other tenants occupied other parts of it at the time of the purchase by the defendant, and the number of acres was a fact likely to be known by the several persons interested in the lot. It is not pretended in the case that the lot did not contain two hundred and fifty acres, and, when the defendant applied to purchase, it is extremely probable that he and Mrs. Mann equally well knew so important and so notorious a fact as the number of actual or reputed acres. But the agreement for the purchase, signed by both of them on the day of the date of the deed, stated that Mrs. Mann had agreed to convey to the defendant a tract of land containing two hundred acres, and the deed itself, which follows in the description of the boundaries the words of the former deed to Mrs. Mann, adds, containing two hundred acres, more or less. Why did it vary in this particular from the former deed and not follow the description throughout? This was a circumstance which would probably attract attention as soon as the other parts of the description. A purchaser, being on the lot and well acquainted with it, would ordinarily attach much importance to a declaration of the quantity of acres. If the whole lot was intended to have been sold, it is inconceivable why that part of the description, in the former deed should have been varied in so great a degree as from two hundred and fifty to two hundred acres, and why the previous agreement in writing should speak of a tract of land of two hundred acres instead of the lot itself, well known to contain two hundred and fifty acres.

The two receipts for rents, dated the 8th and 9th of June, 1804, do not appear to me to afford much inference, one way or

the other. The first receipt was for the payment of the arrears due from the defendant for his one hundred acres, and the second for arrears from the other occupants. It says, in full for rent for lot 57, occupied by defendant. This was a loose and very inaccurate expression, and it is difficult to know what was meant. These receipts appear to me to be of no moment in the case.

But, if we resort to the parol proof, it is clear and overwhelming, when connected with the inference from the documents, that Mrs. Mann did not intend to sell and that the defendant did not intend to buy more than two hundred acres, and that the fifty acres occupied by Cable were not included in the bargain.

Elizabeth Crossby was present when the parties were making the contract, and she remembers that Mrs. Mann was positive and absolute in her refusal to sell more than two hundred acres, or to sell the part occupied by Cable, and that she assigned as a reason that Cable held the land under lease. We have also the testimony of several witnesses residing near the land, and who had been long and well acquainted with the lot and with the defendant, who testify to the great value of Cable's part in 1804, and to the confessions of the defendant, after his return from making the purchase at New York, that he purchased two hundred acres only, and did not purchase Cable's part of fifty acres, but that he found afterwards that his deed included the whole lot. The witnesses who testify to these confessions and declarations of the defendant, are Josiah Corbet, Jonathan Wood, David Brown, Caleb Brown, Daniel Case and Jonathan Cable. These six witnesses are all unimpeached, most of them are neighbors to the defendant and strangers to the plaintiffs, and it is impossible not to give full credit to such a mass of testimony all going to one point. In addition to this we have the testimony of David Austin, who was in New York, with the defendant, in June, 1804, and he understood from him at the time that his business was to purchase two hundred acres of the lot. It is also proved by Cable, that the defendant told him, a short time before the purchase, that he was going to purchase two hundred acres of the lot.

Some of these witnesses falsify the answer in other parts, and prove it untrue as to a matter of fact within the defendant's own knowledge. The answer says, that immediately on receiving the deed the possession of the whole lot was delivered to him by the tenants, all of whom either surrendered their pos-

session to him, or took deeds under him, and that he offered deeds to all the tenants, and particularly to Jonathan Cable, who refused a deed and voluntarily surrendered his possession to the defendant. Cable not only contradicts the fact of any such offer to, or surrender by him, but it is proved by Charles and John Blowers that the defendant entered forcibly and took possession of the mill belonging to Cable.

2. It is unnecessary to enter more minutely into the parol proof of the fact of the mistake. On that point there is no room for doubt. The only doubt with me is, whether the defendant was not conscious of the error in the deed at the time he received it and executed the mortgage, and whether the deed was not accepted by him in fraud, or with a voluntary suppression of the truth. That fraudulent views very early arose in his mind is abundantly proved. He asked Corbet, a witness, if he could not so run the line as to save the lower mill seat to himself; and he told David Brown that he meant to take counsel, and if he found he could hold the whole lot, he intended to do so, as it was not his fault that the deed was made as it was.

It would be a great defect in what Lord Eldon terms the moral jurisdiction of the court, if there was no relief for such a case. Suppose Mrs. Mann had applied for relief, instantly, on discovery of the mistake, and immediately after the delivery of the deed; was there no power in the whole administration of justice competent to help her? It has been the constant language of the courts of equity that parties can have relief in a contract founded in mistake as well as in fraud. The rule in the courts of law is, that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. But equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. "It must be an essential ingredient," says Lord Thurlow, 1 Bro. C. C. 350, "to any relief under this head, that it should be on an accident perfectly distinct from the sense of the instrument." I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract, in writing, founded in mistake or fraud. The mistake may be shown by

parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively, by bill, or as a defense.

In *Henkle v. The Royal Exchange Assurance Company*, 1 Ves. 317, Lord Chancellor Hardwicke said, the court had jurisdiction to relieve, in respect of a plain mistake in contracts in writing, as well as against frauds in contracts. The same doctrine appears to have been held by him in *Simpson v. Vaughan*, and in *Langley v. Brown*, 2 Atk. 31, 203, and by Lord Thurlow, in *Taylor v. Radd*, cited in 3 Bro. C. C. 454; 5 Ves. jun. 595. So again in *Baker v. Paine*, 1 Ves. 456, Lord Hardwicke observed, "How can a mistake in an agreement be proved but by parol evidence? It is not read to contradict the face of the instrument, but to prove a mistake therein." In *Irtham v. Child*, 1 Bro. C. C. 94, Lord Thurlow said, that a mistake creating an equity *dehors* the deed, should be proved as much to the satisfaction of the court as if it were admitted; and afterwards, in *Shelburne v. Inchiquin*, 1 Bro. C. C. 341, 344, he held that parol proof was not incompetent to prove that words taken down in writing were, by mistake, contrary to the concurrent testimony of all parties. Lastly, it was said by Lord Eldon, in the case of *The Marquis of Townsend v. Stangroom*, 6 Ves. jun. 328, that it would be very singular if the jurisdiction of the court should not be capable of being applied to cases of mistake and surprise, as well as of fraud. He owned that those who undertook to rectify an agreement by showing a mistake, undertook a task of great difficulty, but he could not say the evidence was incompetent, though it was not possible to reconcile all the cases on this question.

The cases concur in the strictness and difficulty of the proof, but still they all admit it to be competent, and the only question is: Does it satisfy the mind of the court? Lord Hardwicke said it must be proper proof, and the strongest proof possible; and Lord Thurlow, that it must be strong, irrefragable proof; and he said the difficulty of the proof was so great that there was no instance of its prevailing against a party insisting that there is no mistake. We are now considering the question of the competency, and not of the amount of the parol proof, and it appears to be the steady language of the English chancery, for the last seventy years, and of all the compilers of the doctrines of that court that a party may be admitted to show, by parol proof, a mistake, as well as fraud, in the execution of a deed or other writing. We will next look into the cases for the application of this principle.

On bills for a specific performance of an agreement in writing, the defendant has frequently been admitted to show, by parol proof, a mistake in such agreement, and by that means, to destroy the equity of the bill. The relief on such bills is said to rest in discretion, and if the defendant can show surprise or mistake, it makes the special performance of such an agreement unjust. The cases of *Joynes v. Statham*, 3 Atk. 388; *The Marquis of Townsend v. Stangroom*, 6 Ves. jun. 328; *Rambottom v. Gordon*, 1 Ves. & B. 165; *Clowes v. Higginson*, Id. 524; and *Flood v. Finlay*, 2 Ball. & B. 9, are all to this point. But this is only one class of cases; there is another class in which the object of the parol proof is to correct mistakes in bonds, deeds of settlement, mortgages, and generally in all contracts and agreements, and where the proof is introduced to aid the plaintiff in his bill, as well as to aid the defendant in his defense.

Whether such proof be admissible on the part of a plaintiff, who seeks a specific performance of an agreement in writing, and at the same time seeks to vary it by parol proof, has been made a question. Lord Hardwicke, in *Joynes v. Statham*, seemed to think it might be done; but such proof was rejected by the master of the rolls in *Wollam v. Hearn*, 7 Ves. jun. 211, and again in *Higginson v. Clowes*, 15 Id. 516; and when Lord Redesdale said, in *Clinan v. Cooke*, 1 Sch. & Lef. 39, that he could find no decision in which a plaintiff had been permitted to show an omission in a written agreement, by mistake or fraud, he must be understood to refer to the cases of bills for a specific performance of an agreement, which was the case then before him. There are numerous instances in which the plaintiff has claimed and obtained relief by showing a mistake in the agreement; and there would be a most deplorable failure of justice, if the mistakes could only be shown and corrected when set up by a defendant to rebut an equity.

In *Henckle v. The Royal Exchange Assurance Co.*, the bill was brought by the plaintiff to have a policy rectified, so as to charge the defendants after a loss, and when, without such correction, they would not be charged. The parol proof was admitted, and because the proof was insufficient and uncertain, the bill was dismissed, though without costs. In *Baker v. Paine*, the plaintiff sought, by bill, to be relieved from a mistake in articles of agreement, containing a bargain and sale of goods, and the parol proof was admitted, though objected to, and the articles were rectified. Again, in *Watts v. Bullas*, 1 P. Wms.

60, a voluntary defective conveyance of land was made good, on a bill by a person holding under it, against the heir of the grantor; and in *Simpson v. Vaughan*, 2 Atk. 31; and *Crosby v. Middleton*, Prec. in Ch. 309; and *Burn v. Burn*, 3 Ves. 573, a mistake in a bond was shown by parol proof on the part of the plaintiffs, and the bond amended, though in two of these cases the obligor was dead, and in the third the lapse of time had been very great, and the party against whom the correction was allowed, was a surety. So in *The South Sea Co. v. D'Oliffe*, cited in 2 Ves. 377, and 5 Ves. jun. 601, there was a mistake in a bond, given by way of security, by inserting six instead of two months, and the party was relieved upon evidence of mere verbal communications.

The cases of *Randal v. Randal*, 2 P. Wms. 464; *Cocking v. Pratt*, 1 Ves. 400; *Rogers v. Earl*, Dickens, 294, and *Barstow v. Kilvington* 5 Ves. jun. 593, were bills filed to rectify mistakes in settlements; and in all of them proof *aliunde* was admitted, though the admission was resisted; and in two of the cases, by the defendant, who claimed as heir, against the mistake.

Defects in mortgages, contrary to the intentions of the parties, have also been made good against subsequent judgment-creditors, who came in under the party, who was bound in conscience to correct the mistake: 2 Vern. 565, 609; 1 Eq. Cas. Ab. 320, pl. 1; 1 P. Wms. 279.

It has been said that there was no instance of a mistake corrected in favor of a plaintiff, against the answer of the defendant, denying the fact of mistake. But I do not understand any of the *dicta* on this point to mean, that the answer, denying the mistake, shuts out the parol proof, and renders relief unattainable, however strong that proof may be. The observations of Lord Eldon in the case of *The Marquis of Townsend v. Stan-groom*, certainly imply no more than that the answer is entitled to weight, in opposition to the parol proof; but it certainly can be overcome by such proof. In that very case, the answer denied the mistake, yet parol proof was held admissible. The lord chancellor only said that the evidence must be taken with due regard being had to the answer, and that it must not be forgotten, to what extent the answer of one of the parties admits or denies the intention. Lord Thurlow said, that there was so much difficulty in establishing the mistake, to the entire satisfaction of the court, that it had never prevailed against the answer denying the mistake. I am not inclined, on light grounds, to contradict such high authority, but as I read

the case of *Pitcairn v. Ogbourne*, 2 Ves. 375, before Sir John Strange, the bill was to be relieved against an annuity bond, and to reduce the same from one hundred and fifty pounds to one hundred pounds, according to the original understanding and agreement of the parties. The answer denied positively all the circumstances; every particular of the private agreement, and parol proof, by several witnesses, was objected to and admitted, which falsified the answer, and made out the real agreement to the satisfaction of the court; and though relief was not granted, it was refused upon other and distinct grounds no ways connected with the question, as to the competency and effect of the proof.

It is the settled law of this court, as was shown in the case of *Boyd v. McLean*, 1 Johns. Ch. 582, that resulting trust may be established by parol proof, in opposition to the deed, and in opposition to the answer denying the trust. There is no reason why the answer should have greater effect in this than in that case, and there would be manifest inconsistency in the doctrines of the court, if such a distinction existed. The case of *Marks v. Pell*, 1 Johns. Ch. 598, 599, which was referred to by the defendant's counsel, admitted that parol proof of mistakes was competent; and it was held not to be sufficient in that case, because it consisted of naked confessions of a party, made seventeen years after peaceable possession under a deed. The confessions in that case were also of a negative kind, and deduced from tacit acquiescence; the party who made them was dead, and the possession had been for thirty years under the deed, and there were no corroborating circumstances in aid of the confessions. Surely, there is nothing to be drawn from that case in opposition to the competency of the proof in this.

We have a strong case on this subject in *Washburn v. Merrills*, which was decided on the equity side of the supreme court of Connecticut, in 1801: 1 Day, 139 [2 Am. Dec. 59]. A mortgagor, in that case, made, by mistake in 1784, an absolute deed, which he did not discover until some time after. The mortgagee got into possession, and, in March, 1801, sold to a purchaser, by a deed, with covenants of warranty. In August, 1801, a purchaser under the mortgagor filed his bill, or petition, against the purchaser under the mortgagee, to redeem. The answer set up the statute of frauds as a defense; and, on the trial, parol proof of the mistake was offered by the plaintiff, objected to and admitted, and the deed established as a mortgage, and a right of redemption decreed. This decree was

afterwards unanimously confirmed in the court of errors of that state.

My opinion, accordingly, is, that the parol proof in this case was competent and admissible, and that it establishes, most clearly and conclusively, the fact of the mistake, as charged in the bill. I am also of opinion that there is no acquiescence here to bar the plaintiffs. Mrs. Mann was but a trustee for one of the plaintiffs, then an infant; and it is in proof, that when she discovered the mistake, she communicated the fact, as early as 1806, to Joseph Harris, who called upon her, as agent for the defendant, when she told him of her intention to commence a suit in this court. She died in 1814, and the present suit, by the *cestui que trust*, was commenced with all due diligence. There is no pretext for the suggestion of any delay, or acquiescence, injurious to the just rights of the plaintiffs. Courts have been liberal on this head. A mistake was rectified after seven years acquiescence, in *East v. Thornburg*, 3 P. Wms. 126, and if Lord Hardwicke refused it in *Bell v. Cundall*, Amb. 101, it was after a lapse of forty-four years, and where there was a purchaser without notice.

Nor has the defendant any equitable claim for compensation for his improvements made upon those fifty acres. They were made by him after he knew of the mistake, and had declared his intention to take advantage of it, and fraudulently carried that intention into effect. Such an allowance would be confounding all moral distinctions, and be giving countenance and sanction to the most flagrant injustice.

I shall, therefore, decree that the defendant release and convey to the plaintiffs, with proper covenants against his own acts, the fifty acres leased to Jonathan Cable, and possessed by him, and that he pay the costs of the suit.

Decree accordingly.

The doctrine of this case has been questioned in the decisions of some of the states; as, for instance, in *Elder v. Elder*, 10 Maine, 86, where the court say: "In *Gillespie v. Moon*, 2 Johns. Ch. 585, the learned chancellor maintains that relief may be had in chancery against any deed or contract in writing founded in mistake or fraud, and that the mistake may be shown by parol proof, and relief granted to the injured party, whether he sets up the mistake affirmatively by bill or as a defense. We have looked into the cases cited by him, but are not satisfied that they sustain the doctrine to the extent which his language would seem to imply. In some of them parol evidence of mistake was admitted on the part of the defendant to rebut an equity. In others, contracts not relating to real estate, but of a personal

character, were reformed or amended on parol proof of mistake. These cases show that this has sometimes been done in courts of equity; but under what circumstances it is unnecessary to state, as the contract before us is one relating to real estate." It is worthy of note, however, that in this as well as in all the other decisions, in which the authority of the principal case has been doubted, the application was for a reformation of a written contract, by enlarging its terms by parol, and for a specific execution of it as amended, and that in most of them the statute of frauds was relied upon as a defense. But this class of cases, it will be observed, does not come within the precise limits of the decision here made. The distinction between the principal case and decisions of the class just mentioned, is well stated by Welles, J., in *Glass v. Hubert*, 102 Mass. 41: "The principle which was maintained by Chancellor Kent, and upon which the English authorities were cited by him in *Gillespie v. Moon*, was, that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the contract of the parties, might be afforded to a plaintiff seeking a modification of the contract as well as to a defendant resisting its enforcement. That proposition must be considered as fully established, 1 Story Eq. sec. 161. It is quite another proposition to enlarge the subject-matter of the contract, or to add a new term to the writing by parol evidence, and enforce it. No such proposition was presented in the case of *Gillespie v. Moon*, and it does not sustain the right to such relief against the statute of frauds."

The case is also distinguished, in this particular from *Clinan v. Cooke*, 1 Sch. and Lef. 22, in the opinion of the court in *Osborn v. Phelps*, 19 Conn. 72. Upon this point the court say, quoting from the opinion in *Elder v. Elder*: "It is one thing to limit the effect of an instrument, and another to extend it beyond what its terms import." The same distinction is noticed in *Hunter v. Bilyeu*, 3 Ill. 228, where the court say of the principal case: "This decision so far as it goes has been followed by the courts of many other states." But even in its extended application to the specific performance of executory contracts where the plaintiff seeks, at the same time to enlarge the terms of the agreement upon parol proof, the principal case has been accepted and followed as an authority in a number of decisions. Bispham, in his *Principles of Equity*, sec. 382, says: "In this country, although there has been some conflict of authority, the better opinion perhaps is, that the English rule ought not to be strictly followed, but that in proper cases of fraud or mistake, a party ought to have the assistance of a chancellor in enforcing a written contract with a parol variation. This was laid down by Chancellor Kent in the case of *Gillespie v. Moon*, and has been recognised in several states. In others the case has not been followed, and the English rule is adhered to." The cases on each side of the question are cited in a note to the section. Although that was not the precise point decided, as already stated, perhaps the reasoning of Chancellor Kent may justify the doctrine referred to. The American editors in their note to *Woodham v. Hearn*, 2 Lead. Cas. in Equity, 493, review the authorities upon this subject, and critically examine the principal case.

A late New York decision in which the principal case is cited and approved is *Andrews v. Gillespie*, 47 N. Y. 487. Grover, J. delivering the opinion of the court, says: "The correction of mistakes in written instruments occurring by accident, fraud or otherwise has been one of the acknowledged branches of equity jurisdiction from the earliest history of the court, and the party injured by the mistake has a right to demand its correction, upon furnishing satisfactory proof that it has been made: *Gillespie v. Moon*, 2 Johns. Ch. 585. In this case, Chancellor Kent, with his usual ability, states

the doctrine, and the principles upon which it rests, and reviews many of the cases, which had then been determined, and shows that delay in commencing proceedings will not prevent the granting of relief." The case is, also, approved by Denio, C. J., in the earlier decision of *De Peyster v. Hasbrouk*, 11 N. Y. (1 Kernan) 591. Other citations will be found in *Bowman v. Bittenbender*, 4 Watts, 290; *Tilton v. Tilton*, 9 N. H. 385; *Wagenblast v. Washburn*, 12 Cal. 208; *Lestrade v. Barth*, 19 Cal. 673; *Moals v. Buchanan*, 11 Gill and J. 325; *Carpenter v. Providence Washington Ins. Co.*, 4 How. 224; *Veazie v. Williams*, 8 Id. 157; *Andrews v. Essex Fire and Marine Ins. Co.*, 3 Mason, 10.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

POST *v.* MUNN.

[1 SOUTHARD, 61.]

RIGHT OF NAVIGATION.—The right of navigation in a navigable river is superior to all other rights and particularly to the right of fishery; but though superior it does not take away the right of fishery, it only limits it so far as it interferes with the fair, useful and legitimate exercise of the right of navigation.

TRESPASS FOR INJURY TO FISHERY.—An action of trespass *vi et armis* is the proper form of action for a direct, immediate and intentional injury to one's fishery; and the fact that the defendant was in the cabin at the time his vessel tore the plaintiff's net, does not alter the case, he being still the master of the vessel.

IDEM—MEASURE OF DAMAGES.—In actions of trespass, the damages are not always to be measured by the actual cost of the thing injured or destroyed. The whole loss sustained is to be taken into view, and this depends upon its uses, its profits, the particular season or time, or occasion of the injury done, and the benefits or advantages lost thereby.

CERTIORARI. Trespass. Verdict and judgment for the plaintiff. The case appears from the opinion.

Halsey and Stockton, for the plaintiff in error.

Attorney-general, contra.

KIRKPATRICK, C. J.* This was an action of trespass brought by Benjamin Munn, jun., against Henry F. Post, for breaking and injuring a fishing net in the river Passaic. Munn was the owner of a fishery, and had a right to fish at a certain place in the said river. He kept a net for this purpose, and at this time had employed men to fish, giving them for their compensation

* The court consisted, at this time, of the Chief Justice, Rossell and Southard, JJ.

a certain proportion of the fish which were caught. Post was the master of a boat in the same river and sailing the same in the pursuit of his lawful business. The plaintiff's hands had thrown out their net to make a haul, and whilst it was so thrown out, the defendant ran his boat against it, and committed the injury complained of. Several questions were raised before the justice, upon the trial, by the defendant's counsel, and being determined against him, are now brought up here for consideration.

1. It is said that the river Passaick is a navigable river, in which the tide ebbs and flows; that it is therefore, a common highway upon which all the citizens of the state have a right to pass and repass at pleasure; that the right of fishery is subordinate to the right of navigation and must yield to it; and that therefore the injury complained of having happened in the legitimate exercise of this superior right, the defendant is not liable in damages.

Now it is certainly true, that the right of navigation in this river is superior to all other rights and particular to the right of fishery. The master of a vessel is not obliged to slacken his sail or change his course, or yield the channel to a fishing net. Yet, if under the pretense of exercising this right, he shall turn out of his course to run upon a net, or if he shall lie in wait until the net be spread, and then crowd sail to reach it, or if he shall unnecessarily anchor on fishing grounds, or otherwise loiter about it, to prevent its being used as such, in all these cases, and a hundred others of the like nature, which might easily be mentioned, he is answerable in damages. The right of navigation, though superior, does not take away the right of fishery; it only limits it, and limits only so far as it interferes with its own fair, useful and legitimate exercise. Whether a master of a vessel, therefore, be liable or not in any particular case, must depend upon the use he is making of this superior right. If he is using it fairly for fair, useful and legitimate purposes, he goes quit; but if, as a mere pretext to suppress and destroy the subordinate rights of others, he must answer. And this is always a question of fact, which must be submitted to the jury. In this case the justice certifies that there was strong evidence that the injury was done by design. He submitted the question to the jury upon this principle, and in so doing he submitted it rightly.

2. The hands employed by Munn to fish who were actually engaged in managing the net at this time, were objected to as

witnesses, because they were to have for their wages a share of the fish caught, and not a sum certain in money, and therefore were interested. This objection certainly cannot be maintained. It is an action of trespass for a direct injury to the property of Munn, the plaintiff. The judgment could in no way operate to the benefit of these hands, by direct and necessary consequence. What the plaintiff might think reasonable, and how he might think proper to distribute the money recovered is nothing to the purpose. The whole sum recovered is his. They have no lawful claim against him for any part of it.

3. Munn, the plaintiff, offered to prove by these witnesses, at the trial, something concerning the run of the shad in the river a day or two previous to this affair, and the number caught at a haul, and to this the defendant objected. But in actions of trespass the damages are not always to be measured by the actual cost of the thing injured or destroyed. The whole loss sustained is to be taken into view; and this depends upon its uses, its profits, the particular season or time or occasion of the injury done, and the benefits or advantages lost thereby. And if so, all these must necessarily be proved and submitted to the consideration of the jury. The defendant seems to have entertained an erroneous idea, too, with respect to the augmentation of damages to arise from the proof of these facts. He urges before the justice, and now here, that this augmentation, at least, will go into the pockets of these very witnesses, they being paid in a share of the fish and not in money. But there is nothing in this. As has been said before, they can take nothing by the judgment.

4. As to the action being brought in the name of the hands, and not of the owner of the net; and as to its being brought against the sailors, and not against the master of the vessel, because he was in the cabin; and as to its being an action on the case, and not an action of trespass—objections like these cannot prevail. It is therefore the opinion of the court that the judgment must be affirmed.

SOUTHARD, J. The injury complained of in this action is the destruction of a fishing net, in the Passaick river, by running a vessel through it, while extended for the purpose of taking shad. The defense rests upon the broad ground that the Passaick is a navigable river; that the injury was done while in the regular and accustomed exercise of the right of navigation; and that this right is paramount to, and cannot be impeded or interrupted by, the right of fishing.

The positions assumed by the defendant are supposed to be not only tenable, but such as cannot be overthrown. It is, however, unfortunate for him that they do not go far enough to protect him in this action. The Passaick is a navigable river, and the right of navigation in it is a paramount right: Har. L. P. 9-22; Swift, 341; but it is not the only right. The right of fishing must yield to it, when they come in conflict; but it is not swallowed up and obliterated by it. Where one only can be enjoyed, that of navigation must be the one; where both can be enjoyed freely and fairly, that of navigation has no authority to trespass upon and injure the other.

The proper inquiry in a case like the present is, could both rights have been enjoyed? Did the defendant, in pursuit of his lawful and paramount right, intentionally and unnecessarily trespass upon the plaintiff in the exercise of his lawful but inferior right. If he did, no principle either of law or justice will prevent his being compelled to compensate in damages for the injury he inflicted. The question of his liability then becomes one of intention; and must depend upon the evidence which the jury have before them, and which they will weigh, as in every other case. It seems to me, therefore, that no possible objection can well be made on this point to the course taken by the court below. The return states that there was strong evidence that the injury was done by design or neglect, and that this evidence was left to the jury for their decision. Whether the jury decided correctly it is not now in the power of this power to say; the presumption is in favor of their accuracy, and nothing appears to disprove the presumption.

The next objection taken to the proceedings below is, that certain persons who were working with the net, and were to be paid by a share of the fish caught, were admitted as witnesses, whereas, they ought to have been parties. In order to estimate correctly the value of this objection, it is only necessary to recollect that the net and the right of the fishery belonged exclusively to the plaintiff, and that he had employed these men, agreeing to satisfy them for their labor with a determined proportion of the fish caught. He was injured, as he alleged, not by an accidental or consequential effect of the plaintiff's action, but by a direct and designed trespass. He, therefore, sues for the injury not to those in his employ, but to himself, for the injury to his net and this loss of fish. Why, then, must they be joined in the action? Why precluded from giving testimony? He could in no possible shape recover what belongs to them.

They can in no possible shape claim the smallest portion of what he does recover. They can, in no way, be prevented from maintaining any suit which they could have maintained before this was brought.

As little solidity does there seem in the objection to the proof about the run of the shad, and the usual profits of the net. For what is the suit brought? Not alone for the mere tearing of the net; that is but a small portion of the damage sustained. The greatest part of the injury arises from losing the use of the net, and the value of that use depends upon the run of the shad. There is no other mode in which the plaintiff could show what really were the damages sustained by him. I am something at a loss to contrive by what mode of reasoning the counsel for the defendant could satisfy his own mind that the two remaining objections were even plausible. The defendant was still the master of the vessel, though he was sitting in the cabin, and the injury complained of was direct, immediate and intentional, not consequential or accidental.

Upon none of these objections is the defendant well founded. Judgment below ought to be affirmed.

Judgment affirmed.

LITTLE v. MOORE.

[1 SOUTHWARD, 74.]

JUDICIAL LIABILITY.—It may be laid down as a universal position, which admits of no exception, that for a mere error of judgment in the execution of his office, no action can be maintained against a judge of any court. Accordingly an action will not lie against a justice of the peace for erroneously entering judgment and issuing execution against a defendant upon the confession of judgment by a co-defendant.

CERTIORARI. The opinion states the case.

By Court, KIRKPATRICK, C. J. William Little, jun., was one of the justices of the peace for the county of Sussex. An action was entered in his docket in which John Robson was plaintiff, against Amzi Chichester and John Moore, defendants. In this action, Amzi Chichester, one of the defendants, appeared before the justice and confessed judgment to the plaintiff for nine dollars and forty-eight cents, being the amount of a note of hand, dated October 29, 1816, and purporting to be signed by the said defendants. Upon this confession, the justice entered judgment, and issued execution against both

the said defendants, and put the execution into the hands of one John Boyd, a constable, to be executed. And for the issuing of this execution, this action is brought. Moore, the plaintiff, no doubt supposing this judgment to be absolutely void, sets forth in his state of demand that Little granted this execution against him without authority, having no judgment recorded against him, and avers that it was done maliciously and with intent to harass and oppress him; and then concludes by saying in general terms, that he was thereby harassed and greatly oppressed to his damage, fifteen dollars. But he does not say that the execution was executed, or that he was obliged to pay the amount; nor does he lay any other damage specially. In this therefore his state of demand is deficient.

In entering judgment and issuing executions against both these defendants upon the confession of Chichester alone, the justice undoubtedly mistook the law; but it is a mistake into which many have fallen as well as he, and no more subjects him to an action than any other mistake in judgment. Nay, it is even less gross than the mistake in the very action now before us. Shall it be said then that Little has an action against this justice also? Where would all this end?

It may be laid down as a universal position, which admits of no exception, that for a mere error of judgment in the execution of his office, no action can be maintained against a judge of any court. With respect to special and limited jurisdictions, it is said, that if the judge shall exceed his powers, the whole proceeding is *coram non judice* and void; and that all concerned in such void proceeding, as well as the judge as the ministerial officer, are liable in trespass; but while within his jurisdiction, adjudicating upon matters lawfully submitted to him, how erroneous soever his opinions he is not liable. In courts of general jurisdiction an action never lies against the judge, because he has jurisdiction of all causes; in courts of limited jurisdiction it lies only when he exceeds that jurisdiction, and therefore is not in the exercise of his judicial authority. The principle therefore is the same in all courts. It is a principle which lies at the very foundation of a free, vigorous and independent administration of justice. It may be traced from the earliest periods of our juridical history down to the present day. To see it fully discussed, reference may be had to 1 Hawk. 350; 2 W. Bl. 1141; 1 Ld. Raym. 454; Cowp. 172, and a multitude of other books, not necessary to be cited. Indeed, were we to subject the judges of the established courts of justice to private

prosecutions, whenever the passions or resentments of disappointed suitors might dictate that measure, we should subdue their independence and destroy their authority.

This judgment therefore must be reversed.

See the subject of judicial liability discussed in the note to *Yates v. Lansing*, 6 Am. Dec. 290; see, also, *Gregory v. Brown*, post.

VAN RIPER v. VAN RIPER.

[1 SOUTHWARD, 153.]

VERDICT ON SUNDAY.—Where the jury have been unable to agree upon a verdict until the morning of the Sabbath, it is a work of necessity then to receive their verdict.

JUDGMENT IN DEFENDANT'S ABSENCE.—Where judgment is entered without adjournment, in the absence of the parties and without notice to attend, it will be considered irregular. The defendant has a right to be present to hear his judgment, and an opportunity must be given to him for that purpose, either by adjournment or notice.

CERTIORARI. The opinion states the case.

KIRKPATRICK, C. J. This cause was tried on Saturday, the sixteenth of August, 1817, and there is seen among the papers accompanying the *certiorari*, an affidavit stating that the verdict was rendered by the jury, and received by the justice, about four o'clock on Sunday morning. And though this is not assigned as a reason for the reversal of the judgment, yet something was said about it at the bar. By what authority that affidavit was taken does not appear, but be it by what authority it may, and be the fact ever so well established, it certainly does not vitiate the judgment. When the jury are so unfortunate as not to agree until they encroach on the Lord's day, it is a work of necessity then to receive their verdict. It is uniformly done by all the courts in New Jersey.

But there is another difficulty in the case, which is assigned as a reason of reversal. The trial was on Saturday, the sixteenth of August, the verdict was rendered, say on Sunday morning at four o'clock, being the seventeenth, and the judgment was entered on Tuesday, the nineteenth, and that without adjournment, in the absence of the parties, and without notice to attend. This is irregular. The defendant has a right to be present to hear his judgment, and an opportunity must be given to him for that purpose, either by adjournment or notice. This

has been heretofore adjudged more than once, but probably before the appointment of a reporter.

Let the judgment be reversed.

ROSSELL, J., concurred.

SOUTHARD, J. The first objection to this judgment is founded upon the state of demand which is said to contain two counts which cannot legally be joined. The first count states in substance that the plaintiff, at the request of the defendant, loaned him a horse worth seventy-five dollars to be used and worked by the defendant. That defendant engaged to take care of and deliver the horse to the plaintiff, when requested so to do; that not regarding "his promises and assumptions," etc., he did not return the horse nor take due and proper care of him, but hampered and fastened his head with a rope to one of his legs in a negligent and careless manner, so that he became "entangled, strangled and choked to death." The second count is a formal count in trover for this horse.

The objection taken to the joining of these two counts is that the first is upon a contract, and the second in trover. The objection is incorrectly taken. The first count is laid *ex delicto* of the defendant. The claim of the plaintiff arises not from a breach of an *assumpsit* to pay money, but from damages resulting from the malfeasance of the defendant. It is a case of tort, in which the same plea may be and was pleaded, and the same judgment may be rendered as in trover. The two counts may therefore well stand together. I cannot distinguish this case from that of *Dickon v. Clifton*, 2 Wils. 319. The first and second counts there were against a carrier for so negligently carrying malt as to suffer it to be embezzled and lost. The third count was in trover, and the declaration was held well. Many cases support this doctrine. The case cited from Pen. 382 does not appear to me to be applicable to the principle of this case. Three items were joined: in debt, in case, in trespass. The same plea and judgment would not answer.

2. The second objection taken to this judgment, is founded upon certain affidavits from which it satisfactorily appears that the cause being tried on Saturday, the jury did not agree and render their verdict until three or four o'clock on Sabbath morning, when it is alleged no verdict could be received, and Pen. 856 and 900, are cited to support the position. In the first case referred to, it appeared that the horse about which the suit was brought, was sold on the Sabbath, and the sale was there-

fore argued to be void. But though Judge Pennington, in delivering his own opinion, and (so far as appears by the report) the opinion of the court, inclined to think the act in Pat. 329, would prevent the court from aiding in the execution of a contract made for goods "cried, showed forth, or exposed to sale" on Sunday, yet he was not prepared to say that all contracts made on that day were void, nor does he deny the legality of the particular sale in dispute, or the sufficiency of the judgment on that ground. This case, therefore, will not be found to aid the position contended for. In the other case, in Pen. 900, one of the court says, that if "the judgment was rendered on Sunday, it must be reversed." It does not, from the report, however, appear satisfactorily that this was the opinion of the whole court; and it is to be remarked, that there is a strong distinction between that opinion and this case. A judgment need in no case necessarily be rendered on the Sabbath; a verdict must in some instances be received on that day, or the jury be dismissed without receiving a verdict at all, from their hands.

In *Pierce v. Fauconberg*, 1 Burr. 292, the verdict was rendered on the Sabbath, recorded, and judgment upon it. I understand there are many instances of the like kind, in the circuits in New Jersey, and although it is the solemn duty, both of courts and juries, so to arrange their business, and so to discharge their duties, as never to encroach, in the smallest degree on the Sabbath, if it be possible to avoid it, yet where the jury have been compelled to reach the morning of that day, before their verdict was prepared, I see no mode of proceeding so proper as to receive the verdict, dismiss the jury and parties, and at such future day as may be convenient and proper, take the subsequent proceedings. This must be done *ex necessitate*.

Upon the third point, I entertain the opinion expressed by the chief justice. The defendant is entitled to the privilege of hearing judgment rendered. He can take certain steps upon its rendition, which he may think essential to his interests, and of the benefits of which he would be deprived were it rendered in his absence and without notice. If, therefore, the justice is not prepared to render judgment upon the conclusion of the trial, it is his duty to inform him when he may attend for the purpose. Upon the third reason, therefore, I concur in the reversal of the judgment.

Judgment reversed.

This case will be found cited in Proffatt on Jury Trial, sec. 455, and its doctrine examined.

STATE v. MORRIS TURNPIKE Co.

[1 SOUTHARD, 168.]

TURNPIKE CORPORATION'S LIABILITY TO REPAIR.—Where a turnpike corporation was indicted for not keeping a bridge in repair on the line of their road, but on an unfinished part thereof, it was held that the corporation was not liable, as their charter provided that their power should cease and be of no effect, so far as related to the unfinished part.

CERTIORARI. The Morris Turnpike Company was indicted for not repairing a certain bridge on their road, which bridge had fallen into decay, so as to impede the traveling. The following facts appeared from an agreed statement: The company was incorporated with the power of building a certain road, estimated to be about sixty-two miles in length, their power to cease and be void as to such parts of the road as remained unfinished seven years after the act of incorporation. After forty-eight miles had been completed, commissioners were appointed by the governor to inspect the road, and these commissioners reporting favorably, license was granted to erect eight toll-gates and take toll. The company, foreseeing their inability to complete the entire road, had formed their turnpike so as to include the roughest and most mountainous parts, and left generally unfinished only such portions as being public highway were under the care of the township officers, and naturally level, firm and good. The fourteen unfinished miles were not continuous, but were separated by parts of the turnpike road of the company. One portion of thirty-six chains in length, a free public highway, being a good level piece of road, the company omitted to turnpike, and never claimed any toll nor were licensed to claim toll for any part of it. On this part of the road was the bridge which had fallen into decay, and which during the whole existence of the company, for seventeen years, had been repaired by the township officers, until the falling thereof about a year ago.

Attorney-general, for the state.

G. H. Ford, contra.

KIRKPATRICK, C. J. There was a *certiorari* directed to the court of quarter sessions of the peace, of the county of Morris, to remove the above indictment into this court, and the justices have sent up the indictment itself, probably taken from their files though it is not marked filed, together with the original recognizance upon the allowance of the writ, and a copy of their

order directing the said writ to be returned; all of which are certified by the clerk under the seal of the court, and which in the said certificate are said to be all things touching the said indictment in the said court remaining. There is no record returned nor materials of which this court can make a record; there is no caption; it does not appear when the indictments were found, nor by whom they were found, nor by what authority, nor to whom presented. The mere indorsement of the time of finding on the back of the indictment, or the placing of it at the head, or at the foot of the same by the attorney-general, or by the clerk, is not sufficient. It makes no part of the record. It must always appear, and it can lawfully appear only in what is called the caption; that is, that part of the record which recites all the circumstances introductory of the indictment itself.

The legitimate office of the *certiorari*, in these cases, is to bring up the record, and not the papers from the files, unless such papers be specially called for; and this record, when brought up, must contain distinctly, in itself, all the matters above specified; for otherwise it contains no lawful charge upon which the citizen can be put to plead or brought to trial. But inasmuch as the attorney-general and the turnpike company for the sake of saving trouble and expense, have submitted the question as to the liability of the said company to keep up and maintain the said bridge, in the said first indictment mentioned, upon a case by them stated; and inasmuch as the court are willing to meet their wishes in this respect, and to put an end to the controversy, especially as it affects the public traveling, and general convenience of the country, therefore they have thought proper to look into it. Having the liability of the company only in view, it is not necessary to examine the form of the indictment, to which objection might be raised. It is sufficient to say that it charges in substance that a certain bridge commonly called the log bridge, in the county of Morris, which the said company were bound to keep up and maintain, was, from the first of October, 1815, until the finding of the said indictment, suffered to be in great decay, broken, ruinous, etc. And the case raised upon the indictment, and submitted to the consideration of the court, is in these words, to wit: [His honor here stated the case.]

Upon looking into this act, we find it enacted, among other things, in sec. 10: "That as soon as the said company shall have completed twelve miles of the said road, they may apply to the governor, who shall appoint commissioners to view the

same, and if they shall report that the same is finished according to the true intent and meaning of the said act, he shall, by license, under his hand, permit them to erect two gates or turnpikes thereon, and to receive and take toll, etc., and in like manner for every six miles hereafter so made, approved, etc., to erect one gate, take toll," etc. We find it further enacted in sec. 14: "That if the said company shall not commence their operations within two years after the passing of the said act, or shall not within seven years afterwards complete the said road, then all their power shall cease, be void, and of no effect, so far as may relate to the parts unfinished."

In the making of the road the act prescribes no particular place of beginning, no particular portion which shall constitute the said first twelve miles; nor does it direct that the reaches of six miles, afterwards to be made and licensed, shall be contiguous to, or in continuation of the said first twelve miles, or of one another. All this was left to the discretion of the company; and it was so left no doubt, because it was obvious that the private interest of the company was so blended with the public convenience that the one could not be promoted without promoting the other also. The company, in the exercise of this discretion, have thought proper to leave certain intermediate spaces unmade, and so far as relates to these, their power by the provisions of the act has long since ceased. Instead, therefore, of being obliged to go on and finish these intermediate spaces, of which the space on which this bridge stands is one, they are expressly prohibited from so doing. The law cannot impose a penalty for not doing that which it prohibits to be done. According to the agreement of the attorney-general, therefore, let a *nolle prosequi* be entered.

SOUTHARD, J. The case submitted leaves but little doubt for the court to resolve. The company is indicted for not repairing a bridge on the line of the road. The defense is, that it is not a part of the road, and that they have now neither power over it, nor authority to build or repair it. And this defense seems to be admitted by the facts stated. It is probable that the legislature did not anticipate such a case as has occurred. It no doubt intended that the parts of the road which were made should lie adjoining each other, and not that a short space should be permitted to intervene, throwing upon the public so expensive a burthen as this bridge.

But we must construe the grant to the company according to the manifest meaning of the words, and these seem to justify

the following remarks: 1. The parts made must be on the line of the road, and contain six miles, but need not adjoin each other; 2. The power to compel the company to make the road continuous, if it existed at all, ought to have been exercised before the governor granted a license; 3. After seven years from the passing of the law, the power of the company ceased over all parts of the line of the road which was not then completed. Nothing short of a legislative act could revive their power. If these remarks be correct, all doubt is at an end. The state of the case affirms that the road as it is now used was regularly licensed; that the distance of thirty-six chains, including this bridge, never was turnpiked or licensed, and that the seven years have long since passed away. It necessarily follows that the company cannot make this bridge, and therefore cannot be convicted under this indictment.

Nolle prosequi entered.

VANUXEM v. HAZLEHURSTS.

[1 SOUTHARD, 192.]

BANKRUPTCY AND INSOLVENCY DISTINGUISHED.—Insolvent laws are optional; bankrupt laws are compulsory; insolvent laws operate equally upon all men, and have for their object only the liberation of the creditor from imprisonment; bankrupt laws respect only merchants and traders and exonerate them from their debts.

STATE BANKRUPT LAWS.—Congress has the exclusive power of making laws upon the subject of bankruptcy, and any state law which discharges a debtor from the payment of his debt is void.

FOREIGN BANKRUPT LAWS—DISCHARGE.—A discharge under the bankrupt laws of one state is not a bar to an action on a debt contracted in another state.

ASSUMPSIT upon a judgment recovered against defendants Hazlehurst and others. Plea, *nul tiel record*, and discharge of Hazlehurst, sen., in bankruptcy. The opinion states the case.

By Court, KIRKPATRICK, C. J. The real state of this case does not very clearly appear from the abstract of the pleadings handed up to the court. It is to be taken, however, so far as can be collected from the argument, that Vanuxem and Clark, the plaintiffs, were residents of the city of Philadelphia; that Samuel Hazlehurst, the defendant, who pleads this plea, together with several others of the name of Hazlehurst, had a commercial house in Baltimore, where the debt was originally contracted; that after this, this defendant obtained a discharge

under an insolvent law of the commonwealth of Pennsylvania, which law discharges not only from the imprisonment of the person, but also from the debt itself; and after this discharge this action was prosecuted here. And the question brought up upon the demurrer is, whether this discharge is a good bar in this court.

The plaintiffs, in support of their action and in derogation of the plea, say: 1. In the first place, that the act of the commonwealth of Pennsylvania, is contrary to the constitution of the United States, and therefore inoperative and void; first, because it is a law upon the subject of bankruptcies, and therefore contrary to that clause of the said constitution, which says: "The congress shall have power to establish uniform laws upon the subject of bankruptcies throughout the United States;" and secondly, because it is a law impairing the obligation of contracts, and therefore contrary to that clause of the said constitution which says: "No state shall pass any law impairing the obligation of contracts." And they say: 2. In the second place, that a discharge under a law of the commonwealth of Pennsylvania, even though not contrary to the constitution of the United States, cannot operate upon nor discharge a debt contracted in the state of Maryland.

As to the first of these positions, I observe that by the strict rules of the common law, the same measure was for the merchantman and the husbandman; each was to look to his own risk, each was to pay to the last penny. But as commerce increased, England, too, was obliged to bend her rigid rules, and to provide specially for the security of those engaged in this hazardous employment. Accordingly, towards the close of the reign of Henry VIII, there was passed an act of parliament, entitled "An act against such persons as do make bankrupts," being the first upon this subject; thus introducing, as Sir E. Coke tells us, 4 Inst. 277, as well the name as the wickedness of bankrupts from foreign nations. The name, however, and I believe I may say, with Sir E. Coke, the wickedness of bankrupts being once introduced, the bankrupt laws grew up before the American revolution, by a multitude of amendments, provisions and alterations, superadded the one to the other, by successive statutes, to be in themselves a great system.

Totally distinct from this system, they had also at the same time their insolvent laws, made for the relief of those imprisoned for debt. These insolvent laws were never considered as a part of the bankrupt system. They respected a different class of men;

their objects were different; their effects were different; they were differently administered. The insolvent laws were optional; the insolvent petitioned for the benefit of them upon the terms proposed; the bankrupt laws were compulsory; the creditors petitioned for their benefits, and seized the whole estate of the bankrupt without his consent or co-operation. These insolvent laws were never, either in common conversation, or in their books, or in their judicial language, called bankrupt laws, or in any manner of way confounded with them.

The British colonies in America, now composing the United States, never, so far as I have been informed, considered the bankrupt laws of Great Britain as extending to this country, nor did any one of them adopt the same by any colonial act. After the example of the mother country, they had their insolvent laws for the relief of insolvent debtors, applicable equally to all classes of men imprisoned for debt, but they had nothing like what was generally understood by a bankrupt system. In the language of the country, in the language of the forum and of the senate, insolvency and bankruptcy, insolvent laws and bankrupt laws, were distinct things. The insolvent laws operated equally upon all men, and had for their object only the liberation of the insolvent from the imprisonment of his person; while the bankrupt system respected only merchants and traders, and their negotiations and concerns; it took a retrospective view of their proceedings; it detected their frauds; it set aside their fraudulent contracts and conveyances; it restored to the fair creditor the proceeds of that property to which he was justly entitled, and it dealt with the debtor according to his merits; if misfortune had overtaken him in the paths of integrity and truth, it discharged him from imprisonment; exonerated him from his debts, and left him something wherewith to begin the world anew; but if not, it left him to the rigid rules of justice, and sometimes inflicted penalties besides.

This was the state of things when the constitution was formed. The language of the constitution then, by all fair construction, ought to be taken according to the common understanding of the subject-matter to which it was applied, and according to its generally received meaning and import at that day. And if so, all laws which have in view the objects of the bankrupt system, as it then existed, and especially those which exonerated the debtor from his debt, which was peculiar to that system, and had a place in no other, I say all such laws, by whatever name the individual states may choose to call them, are, according to

the understanding of that day, and according to the true intent of the constitution, bankrupt laws. And of this description is the act of the commonwealth of Pennsylvania, now under consideration. The question then presents itself: had the commonwealth of Pennsylvania constitutional power to pass this act?

That in a confederacy of states so intimately connected in their negotiations and concerns as these United States must necessarily be, the law upon this subject should be the same throughout the whole, was an obvious principle. The evils resulting from a different practice would have been incalculable to individual states, and highly derogatory to the character of the Union, considered as one nation, in their commercial intercourse with foreign countries. The constitution, therefore, in order to prevent these evils, has delegated to congress the power of establishing uniform laws upon the subject of bankruptcies throughout the United States. At first view it would seem strange that a doubt could have arisen on those words. The object is clearly expressed, the power is unreservedly given. What more explicit language; what more simple and obvious mode of expression could have been used to declare that the bankrupt laws, when introduced, should be uniform throughout the United States, and that the congress should have the power of establishing those laws? How, then, is the force of the language evaded?

It is said that the several states as independent sovereignties, before they entered into this compact, had the power of making bankrupt laws as well as all other laws; that this power is not prohibited to them by the words of the compact, and that therefore it is necessarily retained, and still remains unimpaired in their hands. To this argument it is answered that though this power is not in words prohibited to the states, yet it is in words granted to the United States, and as it cannot subsist in the hands of both at the same time, this grant amounts to a prohibition; for that according to the principle of construction engrafted upon the constitution by the tenth amendment, those powers only are reserved to the states which are neither delegated to the United States nor prohibited to the states. But then it is said again that there is a distinction to be made between laws and uniform laws upon this subject, and that the power of establishing the latter only is delegated to the United States, while that of establishing the former still remains in the states; or, in other words, that the power of the states is not taken away, but only subjected to the control of the United

States when they shall think proper to exercise that control. This seems to be the strongest light in which the argument for the power of the states can be placed, and yet even in this light it rests upon a subtlety too nice, I think, to be admitted as a rule of construction in a concern so important. The powers given to the congress are absolute and unconditional; there is no case in which they can be resumed by the states, or in which they revert back to the states upon any misuser, nonuser, or any other contingency whatsoever. Besides, even if this were so, and if this power remained in the states until exercised by congress, yet there is no room for this objection here, for congress have actually taken possession of it, and exercised it so far as they thought expedient. When, in their judgment, the necessity of the country called for it, they established a bankrupt law, and carried it into full effect, and when again that necessity ceased, they repealed it without a substitute, thereby impliedly declaring that no such law was then further necessary, and leaving merchants and traders to stand upon the same footing with all other men in society. Shall an individual state, then, be permitted to question their judgment, to tell them they have acted wrongly, and therefore to wrest the power from their hands, and to exercise it themselves? Is it possible that this power can be bandied about like a tennis-ball, and become the legitimate property of the adroitest player? It cannot be. But after all, the question does not so much depend upon any nice criticism upon the words and clauses of the constitution, as upon its general intent which, it is thought, can hardly be mistaken. Contemplating the difficulties and injustice which would necessarily result from the legislating of the individual states on this subject, led as they frequently would be, by local interests, and still more frequently driven by popular impulse; the convention manifestly intended, that as soon as bankrupt laws should become necessary, there should be a uniform system throughout the United States, and for that purpose delegated this power exclusively to congress. They gave to congress the whole power of regulating commerce, in a commercial point of view, they raised up the United States as one great consolidated empire; they delegated to congress every power necessary to make it such; and among these, as necessarily appertaining to the commercial system, they delegated to them this power also.

The second reason in favor of the plaintiffs' position, to wit: that the act is unconstitutional, because it impairs the obliga-

tion of contracts depends, I think, entirely upon the first. For if the commonwealth of Pennsylvania have a right to make bankrupt laws, they have a right to discharge the debtor from his debt; this, according to the common understanding, at this day, being of the essence of such laws. But if they have not such right, then the words of the constitution are too broad for them to escape. "No state shall pass any laws impairing the obligation of contracts." I say from these I do not see how they can escape, unless they resort to another quibble similar to the one about laws and uniform laws, and affirm that annulling or destroying the contract altogether is not, in a strict grammatical sense, impairing its obligation.

In the first position then, I think the plaintiffs stand upon strong ground, ground from which their adversary can never drive them by fair fight, whatever he may gain through the timidity of those to whom it ultimately belongs to declare the victory. It is well known that this question has divided the opinions of learned men and able judges; it is understood that even judges of the supreme court of the United States themselves, at their circuits, have rendered different judgments upon it. It is with great diffidence, therefore, a diffidence which could be overcome only by the imperious nature of the duties of the seat upon which I sit, that I express a sentiment at all; but being thus constrained, I must express it according to the convictions of my own mind.

2. As to the operation of the act, considering it as the act of an independent sovereign power, and altogether clear of constitutional objections. It is admitted by the counsel that we have no decision in any of our sister states upon a case exactly similar to the present, and that the decisions which seem to embrace the principle are different in different states. In our own state, the only case in which the question has been at all agitated is that of *Hale v. Ross*, or, as I have it in my notes, *Hall v. Ross*, decided in May term, 1811, and reported in Pen. 807. There the contract was in Pennsylvania where both parties then lived. The discharge was in New York under a law of the state of New York, and the action was in New Jersey. Judge Pennington, in delivering his opinion in this case, seems to rely upon what he calls a maxim, found in the writings of one Huberus, a civilian of a pretty ancient date, which maxim, as he cites it, is to this effect: "That by the courtesy of nations, whatever laws are carried into execution within the limits of any government, are considered as having the same effect everywhere, so far as

they do not occasion a prejudice to the rights of other governments or their citizens." In the application of this maxim, he admits that the courts of Pennsylvania might see cause to disregard this law of the state of New York, under which this discharge was made, because it had done an injury to one of her citizens by absolving his debtor from the obligation of paying his debt. But then he does not admit that it would be correct in the courts in New Jersey to do the same thing, and to disregard it also, because whatever injury it might have done to a citizen of Pennsylvania, it had done none to the government of New Jersey, nor to any citizen thereof. And upon this ground, out of comity to the state of New York, he holds the discharge to be a good bar. My brother Rossell, in delivering his opinion in that case, says, he had inclined to the opinion that a discharge under such circumstances was not a good bar, but that upon looking into certain cases adjudged in the commonwealth of Pennsylvania, and reported in Dal. Rep., he had been led to think that the courts there would receive this discharge as a valid act, and that they would not expect that we should go farther in protecting their citizens against the law and judicial proceedings of a sister state than they themselves would do. And upon that ground he concurred in supporting the discharge. I was not satisfied with the reasoning of either of my brethren in this case. The rights of men in matters of property are perfect rights. They are not to yield to principles of comity between states.

There are principles which govern the relations of nations, and limit their rights and powers with regard to one another, which principles are obligatory upon the courts of all the states considered as independent sovereignties. And if by these principles, in the case cited, the state of New York, acting as such independent sovereignty, had a right to discharge the debtor from this debt contracted in Pennsylvania, then the courts of Pennsylvania were as much bound as those of New Jersey to give effect to such discharge; and if not, then neither the courts of Pennsylvania, nor of New Jersey, nor of any other state, could lawfully admit it as a bar. Save this case then, not exactly in point and liable I think to these objections, we have no precedent to guide us, no adjudication upon which we can rely to direct our judgment.

Some stress has been laid in the argument upon that clause of the constitution which says: "Full faith and credit shall be given in each state, to the public acts, records and judicial pro-

ceedings of every other state," and upon the act of congress of May 26, 1790, to carry that clause into effect. But certainly the clause itself can never be so construed as to give effect to the public acts of a state which are contrary to the constitution, or which usurp or exercise the sovereignty of another state, or in any way infringe upon its rights, as is alleged in this case. The question then seems to be untouched, either by decision or by constitutional provision, and to be left upon those principles which limit the power of independent states with regard to each other.

We are put then to inquire what effect the acts of one independent sovereign state can have upon contracts made in a different state and by citizens of a different state? In considering this question, we may lay out of the case the consideration that Vanuxem and Clark, the plaintiffs, were citizens of Pennsylvania, because having gone into the state of Maryland, and entered into a contract which was to be executed there, or in other words, sold property which was to be paid for there, they were, for this purpose, citizens of Maryland, and are entitled to her protection, and to the benefit of her laws. We may lay out of the case also the effect which the bankrupt laws of one country may be permitted to have in another country; for being applicable to merchants and traders only, they have, by a sort of tacit consent, become a part of the law merchant, in a certain sense, and with that, extend throughout the mercantile world. The simple question then presents itself whether one sovereign state can discharge the citizens of another sovereign state from a debt contracted in the latter and to be paid there. And the very statement of the question carries with it, to my mind, a decisive answer. The legislative power of every sovereignty is strictly limited to its own territory and to its own citizens. All the negotiations of men in the civil state, all their contracts, obligations and duties, have relation to and are founded upon the law of the state in which they are made. To protect, govern and enforce these is one branch, and a very important branch of the sovereign power; a branch which can never be touched without humbling and breaking down the sovereignty itself.

Let us suppose the commonwealth of Pennsylvania to make an act discharging from their debts, wherever contracted, all men who shall become resident in the city of Philadelphia within one year from the passing thereof. Will it be pretended that such a discharge shall operate and be carried into effect in

all other governments? And why not as well as the present? Both the one and the other are mere acts of arbitrary power, breaking down and trampling upon the rights of individuals, from supposed motives of public policy—policy in which that commonwealth alone is interested. Will it be answered, that here has been the *cessio bonorum* of the civilians; that the man has surrendered all he had, and that the creditors, wherever they may have been, have had or might have had their proportional dividend of the property, and that therefore humanity as well as policy required that the debtor should be discharged from his debt? But who hath constituted the commonwealth of Pennsylvania to be arbiter in this case? Who hath made her keeper of the conscience and the guardian of the policy of other governments? Is she to prescribe the terms upon which debts and contracts throughout the whole world are to be discharged?

It is admitted that every sovereign state, merely from the force of its sovereignty, may discharge from debts and contracts made within its own territory, and governed by its own laws; and that such discharge attaches to the debt or contract, as well as to the person of the debtor, and is available in all governments, and in all their courts. If a stranger shall have gone into such state and sold his merchandise or other commodities, so that a debt is due to him from a citizen thereof, he shall be bound by such discharge; for, for this purpose he himself was a citizen; and though he should afterward find his debtor in his own or another government, he cannot maintain a suit against him. The debt is discharged. And this is the only legitimate application as it relates to this subject of the quotation from Huberus, before spoken of. But as to debts contracted in another state, and protected by the laws of another state, such discharge, upon whatever pretenses it may be made, is totally void.

It is admitted further, that every state may prescribe the mode of administering justice within itself. It may say that the debtor shall not be imprisoned for his debt, or if imprisoned, that he shall be discharged from his imprisonment, and that either absolutely or upon conditions prescribed, it may lend to the citizen of another state, the force of its laws to compel the execution of contracts made in such other state, and perhaps upon the principles established among nations, it may be under obligation to do so, but it is under no obligation to do more; it is under no obligation to provide other remedies than those which

it affords to its own citizens, in like circumstances. The commonwealth of Pennsylvania might, therefore, fairly discharge this defendant from the imprisonment of his person, for the imprisonment itself is but the mere mode of enforcing the contract, and no part of the contract itself. But then this discharge of the person, can have no force but within the limits of the commonwealth; for the contract still remaining unimpaired and in its full force, either the state of Maryland or any other sovereignty will carry it into effect according to its own mode of administering justice in like cases, the discharge in Pennsylvania notwithstanding.

Upon the whole then, I am of opinion that this law of the commonwealth of Pennsylvania, discharging the debtor from his debt, is a bankrupt law, and if not a bankrupt law, then a law impairing the obligation of contracts, and that in either case it is contrary to the constitution, and void. I am further of opinion, that if it be neither a bankrupt law, nor a law impairing the obligation of contracts, then, by that law which governs the relation of nations, it is confined in its operation to debts contracted within the commonwealth itself, and wholly void as to those contracted in other states. This, therefore, being a debt contracted in the state of Maryland, neither that act, nor any proceedings under it can be set up in this court, as a bar to the recovery of it.

ROSSELL, J. concurred upon the first point, as to the constitutionality and validity of the law of Pennsylvania, but dissented upon the second question.

Plea overruled.

Upon the effect of an assignment under an English bankrupt law upon property of the debtor in the United States, see *Milne v. Moreton*, 6 Am. Dec. 466, and note; *Mitchell v. McMillan*, Id. 690, and *Dawes v. Boylston*, Id. 72. As to a discharge under the insolvent laws of another state see, *Watson v. Bourne*, 6 Am. Dec. 129.

In *Sturges v. Crowninshield*, 4 Wheat. 122, 195, Chief Justice Marshall, delivering the opinion of the court, says as to the power of the states to pass bankrupt laws: "It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the union may not reach. But be this as it may, the power granted to congress may be exercised or declined as the wisdom of that body shall decide. If in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws but their actual establishment

which is inconsistent with the partial acts of the state. It has been said that congress has exercised this power, and by doing so has extinguished the power of the states, which cannot be revived by repealing the law of congress. We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of congress."

For further investigation of this question see the several opinions of the justices in the case of *Ogden v. Saunders*, 12 Wheat. 213.

STATE v. AARON.

[1 SOUTHARD, 231.]

LIST OF TALESMEN.—Under the act providing that one accused and indicted for murder shall have a list of the jury delivered to him two entire days at least before the trial, the accused is entitled to a list of the talesmen for the same length of time, where a *tales* has been awarded, unless such right be waived.

CONFESSIONS OF INFANTS.—Upon his mere naked confessions, an infant under twelve years of age cannot be convicted of a capital offense.

INFANT'S CAPACITY FOR CRIME.—Between the age of seven and fourteen years an infant shall be presumed incapable of committing crime; but this presumption may be rebutted, and if it appear by strong and irresistible evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted and receive judgment of death.

INDICTMENT for murder. Verdict, guilty. A motion for a new trial was made upon points reserved by Southard, J., for the consideration of the supreme court in *banc*. Upon argument before this court the following advisory opinions were pronounced.

L. H. Stockton, G. D. Wall and Joseph W. Scott, were assigned by the court as counsel for the prisoner.

B. Stockton, jun., deputy attorney-general, and *B. Stockton*, *contra*.

KIRKPATRICK, C. J. At the courts of oyer and terminer and general gaol delivery in the county of Monmouth, of the sessions of May, 1818, the defendant was put upon his trial on an indictment for murder and found guilty; but the judgment was respited for the opinion of the justices of the supreme court, at bar on sundry questions raised at the trial. The case was reported this term by Mr. Justice Southard, who presided at the trial, and is in substance as follows, viz.:

That the prisoner is a black boy, who was born in New Jersey in the month of August, 1806, and according to the act of February 15, 1804, entitled, "An act for the gradual abolition of slavery," is to remain the servant of the owner of his mother, she being a slave, and the executors, administrators and assigns of such owner, in the same manner as if he had been bound to service by the trustees or overseers of the poor, until the age of twenty-five years; that at the time when the said murder is charged to have been committed, he was of the age of ten years and ten months, or thereabouts, and was the servant of one Levi Solomon, either as the owner of his mother, or the assignee of such owner. That the prisoner had been arraigned and called for trial at a preceding session of the courts of oyer and terminer and general gaol delivery in the same county, in October, 1817; that a jury had been impaneled and called, and sundry of them sworn, but by reason of defaults and challenges, the whole number of twelve did not appear; that the state then prayed a *tales de circumstantibus*, which the court declined to award, and thereupon the prisoner was recommitted to prison till the next sessions of the said courts, being this session of May, 1818. That the prisoner was then again brought up and put upon his trial, when again by reason of challenges there was a defect of jurors; that upon a *tales* having been prayed by the state and awarded by the court, the prisoner had not inspection of the panel with the *tales* annexed, for two entire days, in order to prepare for his challenges, but he was put upon his trial *instantly* without such inspection. That in support of the prosecution it was offered to give in evidence the confession of the prisoner made to the inquest upon the body of the deceased, or to some of them, as will be hereafter stated, and also his confession to sundry persons afterwards while in prison, to which evidence it was objected for the prisoner, but the objection was overruled, and the confessions admitted. That the prisoner in his defense offered the said Levi Solomon, his master, as a witness in his behalf, to the admission of whom it was objected by the state on account of his interest, and that the objection was sustained and the witness rejected.

Upon this state of facts five questions are raised for the opinion of the justices here, by way of advisement: 1. Can the refusing the *tales* at the first court, and the discharging of the jury, after sundry of them had been sworn, have any effect in this case; and if any, what effect? 2. Had the prisoner a

right to the inspection of the panel, with the *tales* annexed for two entire days, in order to prepare for his challenges before the jury should be taken against him; and if so, what effect will the denial of that right have upon the verdict? 3. Were the confessions of the prisoner made in the circumstances stated, and hereinafter more particularly detailed, lawful evidence against him? 4. Was Levi Solomon a competent witness for the prisoner? 5. Can a court of general gaol delivery pronounce judgment on a conviction had at a previous court?

As to the first and fifth of these questions there can be no doubt. The prisoner having pleaded to his indictment, and put himself upon the country for his deliverance, had a right to his trial; and for this purpose, in the case that happened, the court is not only authorized, but also required to award *tales* until the whole number of twelve jurors be sworn. But though the prisoner have such right, and though the court be thus required, yet that right and this requisition, like all other things, must yield to circumstances, which frequently will bend neither to the rights of suitors nor to the power of courts, and of which the court must always be the judge. However hard it may have been, therefore, for the prisoner to be recommitted till another court, yet it was a hardship which was inevitable, and which can in no way be set up in his defense, or to exempt him from a full and fair trial.

And as to the succeeding court pronouncing judgment upon a conviction had before a former one, it is only necessary to remember that it is a court of general gaol delivery, which always takes the prisoner as it finds him, executes the law upon him, and delivers the gaol. If committed for crime, it gives him in charge to the grand jury; if indicted, it arraigns him and takes his plea; if he have pleaded, it tries him; and if he have been tried and convicted, it pronounces judgment upon him. In whatever stage the prosecution may be, it takes up and proceeds to the end of the law, that the gaol may be delivered. And of this course our books are full of precedents.

2. As to the inspection of the panel after the *tales* returned: By the common law, every person indicted for murder was admitted to challenge peremptorily and without cause thirty-five of the jurors impaneled for his trial. These challenges were pretty early reduced by statute in England to the number of twenty, and our act of March 6, 1795, follows the English statute on that subject, and says that any person who shall be indicted for murder shall be admitted peremptorily to challenge

twenty of the jury and no more. But besides these peremptory challenges thus restrained by the statute, there may be challenges for cause without restraint. These challenges for cause must be made out by proof to the satisfaction of triers sworn for that purpose; and though the proof may in some cases be by the oath of the juror himself who is challenged, yet it cannot be so in all cases, so that it may frequently happen, nay, I may say it must generally happen, that witnesses are to be sought for at a distance, and records of other courts to be examined, and exemplifications to be procured, in order to prove to the triers the truth of the fact upon which the accusation is founded.

By the act relative to the supreme and circuit courts, it is further provided that if by reason of challenges, or the default of jurors, or otherwise, a sufficient number of the jurors on the original panel cannot be had to try the issue or cause, then the courts of oyer and terminer and general gaol delivery are authorized and required to award a *tales de circumstantibus* of persons present at the said court, and qualified according to law to be joined to the other jurors till the number of twelve be sworn; which talesmen shall be liable to the same challenges as the principal jurors. These challenges are humane provisions in favor of life; and in order to give the accused all the benefit of them, the same act of March 6, 1795, provides that any person who shall be accused and indicted for murder shall have a copy of the indictment and a list of the jury, mentioning the names and places of abode of such jurors, delivered to him two entire days at least before the trial.

It appears then that the legislature has given to the person indicted of murder the right of challenging twenty of the jury impaneled against him, peremptorily and without cause, and also the further right of challenging any other number without restraint by the polls and for cause shown; that to enable him to make these challenges with understanding and to verify them by evidence he shall have a copy of the panel two entire days before the trial; that, when a sufficient number of the panel thus to be delivered to him shall not appear, a *tales* shall be awarded, but then such talesmen shall be liable to the same challenges as the principal jurors. It is true that the legislature has not said in express words that a copy of the panel with the talesmen annexed, where such *tales* is awarded, shall be given to the prisoner, but still, if it be the policy of the law to give the accused the liberty of challenging, to give him the inspection of his panel for the very purpose of enabling him to

make such challenges, and if it has provided that the talesmen who are not upon such panel but taken at the bar shall be liable to the same challenges as those on the principal panel, is not the conclusion irresistible that he should have the same time to prepare for such challenges? To what purpose give him challenges upon talesmen at all? Can he take them *instantly*? Could this child take them? Could his counsel who lived at a distance and in different counties take them, and, if taken, was it possible to verify them—to verify them at the moment by the testimony of witnesses, to be collected probably from distant places? The counsel who have spoken to this question have admitted that no case can be found either here upon our acts of assembly or in England, where their statutes, from which ours were taken, decided directly upon this point, nor have I, in my limited library, been able to find anything which could lead to a conclusion different from that which, I think, obviously presents itself upon the very statement of our legislative provisions on this subject.

8. With respect to the liability of infants to punishment and to the giving their confessions in evidence against them, much might be said and ought to be said with great caution. I shall restrain myself to a very few observations. It is perfectly settled that an infant within the age of seven years cannot be punished for any capital offense, whatever circumstances of mischievous intention may be proved against him, for, by the presumption of the law, he cannot have discretion to discern between good and evil, and against this presumption no averment can be admitted. It is perfectly settled also, that between the age of seven and the age of fourteen years, the infant shall be presumed to be incapable of committing crime upon the same principle, the presumption being very strong at seven and decreasing with the progress of his years. But then this presumption, in this case, may be encountered by proof, and if it shall appear, by strong and irresistible evidence, that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted and have judgment of death. But then, in cases of this kind, Sir Matthew Hale tells us, the evidence ought to be strong and pregnant to make it appear he understood what he did, and especially if the accused be under the age of twelve years.

With respect to confessions in general, and especially with respect to the confessions of infants, it is necessary to be ex-

ceedingly guarded. Sir W. Blackstone tells us that hasty and unguarded confessions made to persons having no authority, such as wicket-hole witnesses, even in cases of felony at the common law, are the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, false hopes, promises of favor, or menaces, seldom remembered accurately or reported with due precision, and incapable in their nature of being disproved by negative evidence. In Leach's edition of Hawkins, we find it said that "the human mind under the pressure of calamity is easily seduced, and is liable in the alarm of danger to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant either by the flattery of hope or by the impressions of fear, however slightly the emotion may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction. But if any facts arise in consequence even of such confession, they may be given in evidence, because they must ever be immutably the same, whether the confession which disclosed them be true or false, and justice cannot suffer by the admission. The truth of these contingent facts, however, must be proved independently of and not coupled with or explained by the conversation or confession from which they are derived."

If this be so with respect to confessions in general, how much more strongly does it apply to the confessions of infants, especially under the age of twelve years. Sir M. Hale, speaking of the trial of infants of such tender years, says the evidence ought to be strong and pregnant; that is, as I understand it, disclosing or bringing forth facts or circumstances which, independently of the confession itself, are sufficient to establish the guilt; for he afterwards expressly says that the infant is not to be convicted upon his own confessions, but the jury must inquire of the circumstances disclosed by it, and upon them alone a conviction can be had. The law, then, I think, seems to be pretty well settled, that upon the naked confession of such an infant, he cannot be convicted of a capital offense.

In the case before us, from the statement of Mr. Justice Southard, it appears that this boy, when first interrogated by the inquest, denied the fact; that he was then taken apart by one or more of the jurors and told that he had better confess the whole truth, and that he did then confess that he had thrown

the child into the well in which the body had been found, and from which he had seen it taken; that upon this confession he was committed to prison, and while in prison declared the same thing in the hearing of the gaoler and of sundry other persons for some time; but that afterwards, till the time of the trial, he uniformly denied it. It was difficult to say how far this boy's mind might have been impressed with hope or fear by the language of the jurors who first interrogated him; it is certain, however, that the confession was not altogether spontaneous, for at first he stoutly denied the fact; but having once confessed it is not strange, but rather according to the ordinary course of things, that he should while in prison and under the same impressions, repeat the same story. If the confession, however, rested upon the ground of hope and fear alone, doubtful as it might be, I should have been inclined to yield to its competency, and to leave it to the discretion and judgment of the jury. But then, as I understand this confession, it is a simple, naked confession, disclosing no fact, pregnant with no circumstances to give it authority or in any way to corroborate it. It did not even lead to the discovery of the body of the deceased, for it was found before; it opens up no proof of malice, or hatred, or ill will against the child, but rather the contrary; it is the mere naked confession of an infant under the age of eleven years, obtained by some degree of pressure, at least, after a firm denial, and as such, I speak with great deference to the learning of the court which tried the cause, I should incline to think it ought not to have been admitted as evidence, and if admitted, that it ought not to have been the ground of conviction.

4. As to the competency of Levi Solomon as a witness, little need be said. It is merely the case of master and servant, and is no way varied by the circumstance of the boy's being black and the master white; he is by the words of the act put in the situation of an indented servant. And although this relation has existed from the earliest ages, no case has been produced, and I am bold to affirm, no case can be produced where that relation alone had been adjudged to create such an interest as to exclude the master from being a witness for the servant. If such a principle were once admitted, it would extend itself to all the relations in life. It would exclude the father from being a witness for his son, for he is entitled to his services; and the son from being a witness for the father, for he is entitled to receive from him his maintenance. It would even exclude the creditor in the case of his debtor, and the debtor in the case of

his creditor, for it is easy to see that they may be mutually dependent upon the personal exertions of one another for their rights and for their support. But these interests, however they may weigh upon the human mind, have never been considered as direct and positive, going to the competency of witnesses, but rather as collateral and remote, going to the credibility only. I forbear to cite authorities, for no man has ever been in a court of justice, who has not seen these relations bearing testimony for and against one another.

Upon the whole, then, I incline to the opinion: 1. That the prisoner was entitled to the inspection of his panel with the *tales* annexed for two entire days before the trial; 2. That the confession of the prisoner, such as it is, and under the circumstances in which it was obtained, was not lawful evidence against him; and, if lawful, it was not ground of conviction; 3. That Levi Solomon, the master, was a lawful and competent witness for the prisoner, his interest in his services to the contrary notwithstanding. And, finally, that if I have conceived the law rightly upon these questions, or any one of them, the prisoner ought not to have the judgment of death upon this conviction, but a new trial.

ROSSELL, J., concurred.

At the subsequent oyer and terminer no argument upon the rule was had, but the following opinion was delivered:

SOUTHARD, J. The opinion entertained by this court upon other questions raised by the rule will not make it necessary to investigate the power of a court of oyer and terminer to pass judgment upon a conviction had at a former term. It is sufficient to remark that we feel no doubt on the question. We think that the language of the books, but especially the character and constitution of the court, as established by statute, gives this power, and authorizes and requires its exercise.

2. Has the court of oyer and terminer a right to award a *tales*? and must the defendant have a list of the names two entire days before his trial, so as to prepare his challenges to them in the same way as to the original list? Doubt has been felt by a part of the court upon this question, but it has yielded to the decided reasoning and advice of the supreme court; and we now think that in all criminal cases, a *tales* may be awarded when the original panel is exhausted, by challenges or otherwise. But if a *tales* be awarded, and it be a case where the defendant is by the statute entitled to the list for two days, he

must have a list of the talesmen for that length of time, unless his right be explicitly waived. But although this is our opinion on this point, we should feel some hesitation in granting a new trial for this cause alone, after what occurred. The question was fully brought to the view of the defendant through his counsel, the propriety of awarding the *tales* was discussed, it was awarded and the talesmen called in their presence. No request for time was then made, but by proceeding immediately to the trial without objection on their part or order by the court, they may be considered as having been ready to make their challenges, and as waiving the privilege so far as they could do it.

3. Was there a mistrial, or is any difficulty created by the refusal to award a *tales*, and postponing the trial at the October sessions? We think not. The court may and generally ought to award a *tales* where it is demanded by either party. Yet it is matter of sound discretion, and circumstances may justify its refusal. At October term these circumstances were supposed to exist, and we now perceive no reason to doubt that a proper discretion was then exercised. The decision then made can have no operation in rendering the subsequent proceedings illegal.

4. Were the confessions of the prisoner legally admitted? This is an important question, not merely to the prisoner alone, but to the correct administration of the law. The court felt, and endeavored properly to estimate it as such, and are not now dissatisfied with the opinion expressed. It yields a ready assent to the doctrines of the law contained in the learned opinions by the justices of the supreme court, although there is, in some slight degree, a difference in the view which they take of the facts. It is important here to remark that we do not understand that there was at the trial proof of promises or threats to induce the confession; but a decided denial of both. Although the prisoner was closely pressed as a witness, and there was an anxious desire to discover all the facts, and to learn whether he had not been guilty of committing the act, which he declared that he had seen; yet it was the anxiety only of a moral and religious community, seeking to discover the perpetrator, that it might be purged from the guilt of shedding blood; and he was repeatedly warned not to vary from the truth, and that it would be his safety. This, then, as a legal question merely, is freed from difficulty arising from that source. Were the prisoner an adult, his confessions, under the circumstances, would

be competent. Will the fact that he was under the age of twelve years render them incompetent?

The distinctions which have been taken in the books, as to the age when crimes may be committed and the criminal punished, are in no inconsiderable degree arbitrary. The great subject of inquiry in all cases ought to be the legal capacity of the prisoner; and this is found in some much earlier than others. The real value of the distinctions is to fix the party upon whom the proof of this capacity lies. There is indeed an age so tender that the nature and consequences of acts cannot be comprehended, and every uncorrupted feeling of the heart, as well as every moral and legal principle, forbids punishment. But after we pass this age and progress towards maturity, there have been periods settled, which ascertain the presumption of law as to the existence of this capacity. If under fourteen, especially under twelve years, the law presumes that it does not exist, and if the state seek to punish, it must conclusively establish it. If above the age of fourteen, the law presumes its existence, and if the accused would seek to avoid punishment, he must overcome that presumption by sufficient evidence. But wherever the capacity is established, either by this presumption of law, or by the testimony of witnesses, punishment always follows the infraction of the law. If the intelligence to apprehend the consequences of acts, to reason upon duty, to distinguish between right and wrong, if the consciousness of guilt and innocence be clearly manifested, then this capacity is shown. In the language of the books, the accused is *capax doli*, and as a rational and moral agent, must abide the results of his own conduct.

This capacity to commit a crime, it appears to the court, necessarily supposes the capacity to confess it. He who is a rational and moral agent, and can merit the infliction of legal sanctions, must be able to detail his motives and acts, and must be judged by them. If, therefore, the defendant was of an age to be punished, he was of an age to confess his guilt. It does not seem necessary here to investigate the cases in the books, where persons of very tender years have been punished. It is sufficient to remark, that juries, under the direction of judges whose distinguishing attribute was the love of mercy, have convicted those much younger than the prisoner before us, and they have made the last solemn atonement to violated law. But they were cases where the jury were satisfied that the legal capacity existed. And so ought the jury and the court here to be

satisfied, and satisfied beyond the possibility of question. If the slightest cloud of doubt rested upon the mind on this subject, it should insure acquittal; it ought to prove the pillar which should conduct the prisoner through all his dangers to the place of safety and security.

The confessions of any one, especially of one so very young, and in an offense so highly penal, ought to be received with the strictest caution, and investigated with a desire to obviate their force. And although not induced by the impression of threats, or the delusions of hope falsely encouraged, yet if from any circumstances the jury believe that they were incorrectly made, they should be disregarded; but being legally admissible, it is for the jury to ascertain their weight and deduce the necessary conclusions, and it is for the court clearly to explain the legal import of the evidence. This court feels no consciousness of neglect on this point. As far as it had ability to perform the task, it left no matter of evidence and no inference of law unexplained. It was pressed upon the jury, and we have no doubt that they remembered, "that a mere naked confession ought seldom to take away life;" in the case of so young an infant, never. It ought to be accompanied by evidence of facts which could not fail to evince its truth. And this is believed to be the doctrine contained in *Hale*, 27, which was so strongly pressed by the prisoner's counsel.

In reviewing the propriety of admitting the confessions in this case, it will be recollected that evidence had been submitted to the jury, which was intended to prove both his capacity and the fact charged against him. I allude to the evidence of his playing with the deceased, his working in the field where the crime was committed, his manner when told that the child was lost, and also when he was found, his subsequent conduct in the evening and morning, and the estimate of many of the witnesses of his capacity. This evidence laid such a foundation for his confessions that the court did not feel authorized to withhold them from the jury. Whether under the instructions of the court, they gave them their proper weight, is not here in dispute.

6. Was Levi Solomon a competent witness? By the law of this state, Pat. 103, blacks born after the fourth of July, 1804, are placed in all respects in the situation of persons bound to service by the overseers of the poor. Levi Solomon was not, then, the absolute owner of Aaron. Aaron was not the absolute slave of Levi Solomon. They stood in the relation of

master and apprentice. And without further remark as to the consequences of a conviction to the master, there is no doubt that he was a competent witness in this case. His exclusion furnishes proper ground for a new trial. In this opinion the court unanimously concur.

New trial granted.

For an able examination of the subject of infants' liability for crime, see an article in 5 Law Rep. (N. S.) 364, where the principal case is cited.

POTTS v. IMLAY.

[1 SOUTHWARD, 230.]

MALICIOUS PROSECUTION, WHEN ACTION LIES.—The action for a malicious prosecution will not lie for prosecuting a civil suit, in a court of common law having competent jurisdiction, by the party himself in interest, unless the defendant has, upon such prosecution, been arrested without cause and deprived of his liberty, or made to suffer other special grievance different from, and superadded to, the ordinary expense of a defense.

CERTIORARI. Action for a malicious prosecution. The case is stated in the opinion.

Ewing, for the plaintiff in the certiorari, the defendant below, contended that no case could be found, where this action had been supported, unless the defendant had been arrested and held to bail: Year Book, 7 Hen. VI. 45; 1 Vin. 589, pl. 3; Show. 354; 1 Lev. 275; 2 Keb. 557; 1 Vin. 593; 3 Lev. 210; Cro. Jac. 667; Cro. Eliz. 628; 1 Saund. 228; Bull. 13; 1 Salk. 15; 4 Co. 57; 2 Wils. 302; 3 Dyer, 285; 4 Co. 14; 1 Salk. 13; Gilb. 163; 10 Mod. 145, 209; 12 Id. 257, 208; Com. 190; 2 Chit. 241; 1 Bac. 62; Yel. 117; Hob. 205, 206; 4 Mass. 435; 10 Johns. 106; Pen. 979.

Wall, contra, cited, 2 Bl. Com. 274; Hob. 266; Sty. 379; 1 Ld. Raym. 378, 380; 5 Mod. 409; 2 Wils. 305, 145; 4 Mas. 435; 10 Johns. 106; 3 Day, 411; 3 Co. 161.

KIRKPATRICK, C. J. This is an action on the case for a malicious prosecution. The plaintiff, in his state of demand, sets forth in substance, that the defendant, of malice and without probable cause, on the tenth day of June, 1813, instituted an action against him for ninety-nine dollars, in the court of James B. Stafford, Esq., one of the justices of the peace of Monmouth county, by a summons returnable on the twenty-ninth of the same month, that upon the return day of the summons, the de-

fendant procured the cause to be adjourned till the tenth of July following, and that on that day he did not appear, but made default and became nonsuited; that on the seventeenth day of July, the said defendant again, of malice, and without probable cause, instituted another action against him in the court of the said James B. Stafford, for ninety-nine dollars, by a summons returnable on the twenty-seventh of that month, that on the return day of this summons the defendant again procured an adjournment until the seventh of August, then next, and on that day voluntarily discontinued his suit, whereby the said plaintiff says he is greatly injured and hath damage to one hundred dollars.

Upon this state of demand this cause came on to be tried by a jury of the county, on the twenty-first of September, 1813, when a verdict was found and a judgment rendered for the plaintiff for fifty dollars. There are several reasons assigned for the reversal of this judgment, but the one principally relied upon, and the only one of which I shall take notice, is the fourth, that is to say, because the state of demand is illegal and insufficient, and contends no lawful cause of action. The cause has been twice argued at the bar upon this reason, the last time at the request of the court, and with much ability.

The books have been searched for four hundred years back, and upon that search, it is conceded even by the counsel for the plaintiff below, himself, that no case can be found in which this action has been maintained in circumstances similar to the present. It is true that there are general expressions made use of by some of the annotators which might seem, at first view, to embrace the case, as in Hargrave's notes upon Co. Litt. 161, and some others; so, also, in some of the reporters; but these general expressions, by fair rules of construction, are to be limited, and compared with the adjudged cases themselves, and not to be carried beyond them. With such limitation, of which, too, they will very fairly admit, they are perfectly consistent with general principles; but without it, they are not law.

Formerly the amercement, now the costs, are the only penalty the law has given against a plaintiff for prosecuting a suit in a court of justice in the regular and ordinary way, even though he fail in such prosecution. The courts of law are open to every citizen, and he may sue, *toties quoties*, upon the penalty of lawful costs only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defense. They are given to him for this purpose, and he cannot rise up

in a court of justice and say the legislature have not given him enough. If we were legislators, indeed, perhaps we should be inclined to say that the costs, in all cases where costs are given, should completely indemnify the party for all his necessary expenses, both of time and money; but those to whom this high trust is committed in this state have thought, and, we will presume, have wisely thought, otherwise. In England, it is believed that costs are in some measure discretionary with the court, and are apportioned to the circumstances of the case; but here it is not so. They are fixed by statute; they can neither be increased nor diminished, but, *ceteris paribus*, are precisely the same in all cases. Perhaps a greater latitude given to the courts of justice ought, in some degree, to alleviate the hardships now complained of.

Besides, if we go to the very equity of the thing, which seems to be the ground of argument here taken, the same reasoning which is here used to prove that the defendant ought to have damages upon a false claim, would also prove that the plaintiff ought to have damages upon a false plea. He is put to all the expense of a trial upon such plea, and yet he can recover nothing therefor but his lawful costs. Though surely all experience teaches us that the plea of the defendant is not less frequently false than the claim of the plaintiff. But to what excesses would this lead us? Where would litigation end? The truth is, that merely for the expenses of a civil suit, however malicious and however groundless, this action does not lie, nor ever did, so far as I can find, at any period of our juridical history. It must be attended, besides ordinary expenses, with other special grievance or damage, not necessarily incident to a defense, but superadded to it by the malice and contrivance of the plaintiff; and of these an arrest seems to be the only one spoken of in our books.

In the case of *Savil v. Roberts*, in the time of William III., Salk. 15, which seems to be a leading case on this subject, Holt, C. J., says: "A civil action differs very far from an indictment in this respect. In a civil action the defendant has his costs, and the plaintiff is amerced for his false claim. To bring a civil action, therefore, though there be no ground, is not actionable, because it is a claim of right in the king's courts, to which every subject may have resort, and he has found pledges, is amercible for his false claim and liable to costs. It is not enough to declare that such action was *ex malitia et sine causa, per quod*, he was put to great charges; he must go further; he

must show special grievance, as that the prosecutor had no cause of action, or cause of action only to a small sum, and that he had sued out a *latitat* for a large sum with intent to imprison him, or do him some special prejudice."

So in lord chief baron Gilbert's report of the case of *Parker v. Langley*, Gilb. Cas. 161, about the close of Queen Anne's reign, where this question is investigated with much ability, Parker, chief justice, in giving the opinion of the court, says: "The applying, in a civil action, to a court of justice for satisfaction or redress, has been so much favored that no action has ever been allowed against a plaintiff for such suit singly and directly, on pretense of its being false and malicious."

"An action upon the case has not yet succeeded, but only where the plaintiff, in the first suit, made the course of the court requiring special bail a pretense for detaining another in prison, and where the malice was so specially charged, that it appeared that the end of the arrest was not the expectation of benefit to himself by a recovery, but a design of imprisoning the other."

I have had occasion to look into this doctrine once before, in the case of *Woodmansie v. Logan*, reported in Pen. 93. The opinion then expressed is precisely the same which I now entertain upon looking farther into the question, aided as I have been by so careful an examination of books and so able an argument at the bar.

Upon the whole, upon the strength of these authorities, I think it may be laid down as law, that this action cannot be maintained for prosecuting a civil suit in a court of common law having competent jurisdiction by the party himself in interest, unless the defendant has upon such prosecution been arrested without cause and deprived of his liberty, or made to suffer other special grievances different from, and superadded to, the ordinary expense of a defense.

The case before us is for a suit commenced by summons where there could be no arrest; nor does the state of demand set forth any grievance or damage other than, or different from, the common expenses of making defense, in suits of this kind. That the litigation was protracted as far as the rules of the court would admit; that it was renewed and ultimately discontinued by the party, does not alter the case. These circumstances are, at most, only evidence that the prosecution was malicious and without probable cause; but this is not enough. There must be a special grievance, and that specifically charged in the complaint filed.

Therefore, in my opinion, let the judgment be reversed.

ROSSELL, J. The reason why but few cases of malicious prosecution are found in the English reporters is, that the costs are sufficiently great to deter men from bringing suits there merely for vexation. So in our courts of more extensive jurisdiction, perhaps, no case can be shown of a person from malice only, prosecuting a suit, the costs of which would inevitably fall on himself. But since the jurisdiction of justices' courts has been increased, many instances have arisen of persons being summoned from their homes thirty or more miles, to defend themselves against a groundless demand, maliciously contrived to harass and perplex them. Unprincipled men have frequently boasted on some real or imaginary injury, that they would be revenged on their antagonists by harassing them with feigned demands, before justices thirty or forty miles distant, as the costs would amount to a few cents only. If, then, not a solitary case could be found in any English reporter, nor even the principle in terms hinted at, I should not hesitate to say the action was maintainable on principles of common sense, common right and common justice. But the principle is established in *Hob. 206, 266*: "If a man sue me in a proper court, yet if his suit be utterly without ground, and that certainly known to himself, I may have case against him for the undue vexation and damage he putteth me into by his ill practice. But two cautions are to be observed to maintain actions in these cases: 1. The new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust; 2. That there must be not only a thing done amiss, but also a damage, either already fallen on the party or else inevitable."

This principle so clearly laid down by Lord Hobart, though not frequently acted on for the reasons before mentioned, has not been lost sight of by the English courts. In *12 Mod. 4*, it is said: "The first point was at Huntingdon assizes, and referred to the common pleas, and there adjudged, that to sue a man without any cause of action at all, no action lies, unless it appears to be with a malicious and vexatious design." *12 Mod. 201*, by Holt, C. J.: "That notion that no action doth lie for bringing an action malicious, is not to be taken largely and universally, but with some restrictions. If any special matter is shown whereby it appears to the court that it was frivolous and vexatious, he shall have an action; but though this action does lie, yet it is not to be favored, and ought not to be maintained without rank and express malice and iniquity." *Co. Litt.*

161, Hargrave's notes. "There is also a remedy for a false or malicious suit, where the injury comes from only, and in such case the party prosecuted may have an action on the case for damages, as well where the vexation is practiced by a civil suit as if it was carried on through the medium of a criminal process. Indeed, the numerous cases in the books are chiefly for criminal prosecutions, and Lord Hobart, Sergeant Rolfe, and Lord Holt, all concur in the idea that when a civil suit is commenced falsely and maliciously, and for the mere purpose of vexation, it is actionable. No man is punishable, whether suing in a civil or criminal form, however false the suit may be in foundation, except by the payment of costs; but if the suit be malicious, as well as false, he is on that account punishable."

These high authorities so fully recognizing the principle, and placing it on the grounds of immutable justice, as it respects the injured, and safety, as it concerns the ignorant but innocent prosecutor, are completely satisfactory to my mind, and I have no hesitation in saying that this action may in all proper cases be maintained.

SOUTHARD, J. I agree in opinion with the chief justice. The positions laid down by him I believe are law, and I cannot add to their elucidation. Originally, when a false claim was made and vexatious suit carried on, the plaintiff was subject to amercement, but he was not subject to damages in addition. That was considered sufficient, and it was not the notion of those days to prevent men from applying to courts for a redress of their grievances. After the amercement fell into disuse, the legislature interfered and gave costs; but for what purpose? To compensate the party for his ordinary and regular expenses in his suit; but not for any injury out of the usual and common course of proceeding in courts of justice. For such it did not pretend to apply a remedy. The legislature no doubt supposed that it had given costs enough to effect the purposes which it had in view. It did not intend that the party should come in, say that the provision was not ample enough, that the costs did not satisfy his expenses, and therefore claim damages by suit, to correct the miscalculation of the legislature.

It was alleged, however, in the argument at the bar, that in the court for the trial of small causes, no costs are really received by the defendant for his own benefit and to pay his expenses; and therefore that he must be entitled to sue where he has been put to cost in that court. The reasoning is fallacious. In this as in every other court the legislature have fixed what

costs shall be given. If it was thought best that these costs should amount only to so much as the party was obliged to pay to the officers and witnesses, etc., still it is a legislative determination of the matter, and parties have no right to object to it. Besides, quite as much money does go into the pockets of the parties in that court as in any other. Parties nowhere put money into their pockets by bills of cost; they never remunerate them for time, labor or expense; they only amount to the sums lawfully due to the officers and witnesses. In every suit, no matter how regular or correct in law and justice, both plaintiff and defendant are compelled to submit to a considerable amount of expenses, which bills of cost never can reach, nor even were designed to reach. I cannot believe that the defendant can recover these expenses by suit, where he can prove that the plaintiff maliciously sued him. This would neither be lawful nor expedient. He must be able to show something more, as arrest or special grievance. Those cases which were cited to show that expense alone was sufficient to maintain the action, do not contradict this position. They are all criminal cases, or refer to and are founded on them.

Savil v. Roberts, Salk. 15, was a case of indictment, and it is said that though the indictment do not produce scandal or imprisonment, yet the expense incurred by the groundless prosecution will support the action; yet this very case draws the distinction between civil and criminal prosecution, and says, "that in the civil suit an arrest is necessary." If so, expense alone is not sufficient. So also the case in 10 Mod. 148, 214, decided shortly after that of *Savil v. Roberts*. So in Str. 977, there was a criminal prosecution of the wife and the husband was put to expense. So in all the other cases to which I have been able to refer; yet on these cases writers found their *dicta*, that expense is a sufficient foundation for this action. It is not so where there was not a criminal prosecution, and where there is only the ordinary expense and grievance of the suit to be complained of.

There is a very short and not very clear case in a late reporter of the decisions of this court. I mean *Taylor v. Wilson*, 1 Coxe, 362, which seems to express the opinion of the court on this subject, at a former day. The action was brought to recover back costs and expenses to which the plaintiff had been put in defending himself in a suit where the court declared there was no cause of action. The court say: "No action lies for such

expenses, though there can be no doubt Wilson has been injured."

It is not unlikely that some of the inconveniences which have been mentioned at the bar will result from the doctrine now established in the court for the trial of small causes. Unprincipled men are often to be found in every society, who, for the sole purpose of vexing and harassing a neighbor whom they dislike, will bring many malicious suits, if the only evil they are to suffer is the payment of costs in that court. But the contrary doctrine would lead to consequences not less unpleasant; and if this were not so, we cannot here remedy the evil. By enlarging the jurisdiction of justices and giving almost nominal costs, the legislature have offered temptations to the malignant to bring vexatious suits. Higher costs would repress this feeling. It is only in that court that such suits are heard of. But the law I conceive to be clear, and if remedy be necessary, it must come from a different authority from this court.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

DORSEY v. JACKMAN.

[1 SERGEANT & RAWLIN, 42.]

RECOVERY OF PURCHASE-MONEY.—A purchaser of real estate cannot recover back the purchase-money in an action for money had and received where the title proves defective, unless there be fraud or warranty.

WARRANTY OF TITLE.—There is a distinction between the sale of goods and of land in respect of a warranty title, which is implied in the former, but not in the latter.

ERROR to common pleas. The action was *assumpsit* for money had and received, brought by the defendant in error, against Dorsey, to recover the amount of the purchase-money of land. The facts are set forth in the opinions.

Campbell, for the plaintiff in error.

Mountain, for defendant.

TILGHMAN, C. J. This is an action for money had and received, brought by Jackman, the plaintiff below, against Dorsey, the defendant, who had sold and conveyed to the plaintiff, a tract of land, without warranty of any kind. The plaintiff had paid the purchase-money, after which, apprehending the title to be defective, and having made a second purchase from the person in whom he supposed the true title to be vested, he brought this action to recover the money paid on the bad title. The president of the court of common pleas of Washington county, charged the jury in favor of the plaintiff, whereupon the counsel for the defendant excepted to his opinion, and the cause has been removed to this court by writ of error.

The opinion of the court of common pleas was founded upon this principle: that the action for money had and received, is in

nature of a bill in equity, and lies in all cases where the defendant has received money, which he cannot in good conscience retain. The money having been paid in this case for land, to which the defendant had no title, the consideration of the payment has failed, and therefore it is concluded it ought to be refunded.

But although the title has proved defective, it does not follow that the money cannot in good conscience be retained, because it may have been the intent of the parties that the purchaser should run the risk of the title. Between the sale of goods and of lands there is a marked distinction. In the former, the law implies a warranty, but not in the latter. This distinction is of long standing, not founded on an arbitrary rule, but existing in the nature of things. With regard to goods, possession is strong evidence of title, and the only evidence which in most cases the purchaser can obtain. But as to lands, the case is altogether different, because the title depends on writings only. Of these writings, one party is as able to judge as the other. The construction is often doubtful, and in doubtful cases where the purchaser requires no warranty, it is reasonable that the price should be reduced in proportion to the hazard. When it has been long understood that no warranty is implied on a sale of lands, it must be supposed that both buyer and seller proceeded on that understanding. Consequently the purchase-money may be retained with good conscience. I take for granted that the seller has practiced no fraud or deception. If he has, the case is altered, and the purchaser may be relieved on other grounds than failure of the consideration. That the law has been held as I have mentioned, will appear, not only from the opinion of elementary writers, but from adjudged cases, both at law and in equity, and I know of no adjudged case of good authority to the contrary.

In the case of *Lord Butkhurst v. Fenner*, 1 Rep. 1, it was determined that if one seised in fee conveys to another in fee without warranty, and without mention of title papers, yet the papers pass to the feoffee, "because he is to defend the land at his peril, it is therefore reasonable that he should have the papers as incident to the land, and that the feoffor should not have them, because he can receive no benefit by keeping them, nor sustain damage by delivering them." In *Sergeant Maynard's case*, 2 Freem. 1, the sergeant had purchased land and paid his money, but a common recovery being necessary to complete the title, he took a bond from the seller, conditioned for the

suffering of the recovery, the seller tendered the recovery, but the sergeant having discovered a defect in the title, filed a bill in equity to obtain restitution of his money, but the court decreed against him, because it did not appear that the seller had been guilty of any fraud. In 1 Fonbl., 363 to 366, notes, the cases on this subject are collected. and the law laid down in the same manner. In *Boyd v. Bolst*, tried before Chief Justice McKean and Judge Rush, at Easton, June, 1785, 2 Dall. 91, it is said that the rule *caveat emptor* applies only to real estate. In *Cain v. Henderson*, 2 Binn. 108, it was decided by this court that the grantor who has given no warranty is a competent witness to support the title of the grantee. This I take to be, and always to have been, the practice in all the courts of Pennsylvania, and is incompatible with the principle of the grantor being answerable in an action for money had and received. There is another principle upon which courts of equity have given relief in case of a defect in the title, discovered before payment of the purchase-money. Concerning that principle I shall say nothing at present, as there is a case depending before us, in the Lancaster district, in which it will be necessary to take a full view of it. Confining myself, then, to the present case, it appears to me that to support the action would be to introduce a dangerous innovation tending to disturb what has long been considered as settled. I am, therefore, of opinion that the judgment should be reversed, and a *venire facias de novo* awarded.

YEATES, J. The exception taken on the first argument to the judgment in this cause, that it was rendered for a larger sum in damages than the plaintiff below had complained of in his declaration, would have been insurmountable, unless the error had been waived. The application for a *remititur* should have been in the court below. We are bound to proceed upon the judgment as we find it.

The error now relied upon, is, that in no form of action whatsoever could the consideration-money paid for this tract of depreciation land be recovered back, the vendor having been guilty of no fraud, and having assigned the commissioner's deed without any covenants on his part respecting the goodness of title or warranty. The question before us is of great moment to the peace and tranquillity of society. On the part of the defendant in error, it has been warmly contended that a warranty must be tacitly implied, as well from the nature of the case as the terms of the original contract, whereby Dorsey agreed to sell

and convey to Jackman lot No. 122 in Nicholson's district of depreciation land, containing three hundred and eight acres, at two dollars per acre, the same having been a full and adequate price therefor; that it would be against good conscience and equity for a man to retain money which he had received for a defective title, and that cases are to be found in the books which would justify a recovery under circumstances similar to the present.

It cannot be denied that there are many words, from the use whereof the law will imply a warranty in a deed, such as give and grant: Co. Lit. 304 (a) Exchange; 4 Co. 121. But I have met with no authority, either ancient or modern, which assigns that legal effect to the expressions, sell and convey. It is obvious that the words grant, bargain and sell, are at least as strong as those used in the original instrument subscribed by Dorsey when the terms of the sixth section of "the act for acknowledging and recording of deeds" passed in 1715 are taken into consideration, and yet the unanimous opinion of the members of this court in *Grats v. Ewall*, 2 Binn. 98, after much deliberation, was, that they amounted only to a special warranty. The like decision was given in *Caine v. Henderson*, Id. 108. It would be a gross inconsistency in us now to assert that the words sell and convey are a tacit warranty in the transfer of lands. A similar question was determined in the same way in the supreme court of New York, on the legal effect of the words grant, bargain, sell, alien and confirm, at common law, when inserted in a deed conveying a fee-simple estate: *Frost v. Raymond*, 2 Caines, 188 [2 Am. Dec. 228]. Dr. Woodison, in his lectures, vol. 2, p. 415, in speaking of the transfer of personal property, has said that a fair price implies a warranty, and that one is not supposed to part with his money without expecting an adequate compensation; but I am yet to learn that this doctrine has been applied to the sale of lands, where a deed has been given and possession taken under it. Indeed, the principle even to personal property, when transferred, came before the supreme court of New York in *Seixas v. Woods*, 2 Caines, 48 [2 Am. Dec. 215], in an action on the case for selling peachum wood for brazilletto—the former worth hardly anything, the latter of considerable value. It was then determined, upon a full review of the case, that if, upon a sale of goods, there be neither a warranty nor deceit, the purchaser buys at his peril, and that there is no instance in the English law of a contrary rule being laid down.

As to the honesty and equity of Jackman's case, it is certain that, according to the civil law, the seller of either real or personal property was obliged to inform the buyer of all the defects of the subject of the contract, and was responsible to him for any latent defect, though not known at the time of sale. But the United States of America in general, and this state in particular, have repudiated that system. We claim as our birth-right the common law of England, which, in the language of Lord Hobart, like a nursing father makes void only that part where the fault is, but preserves the rest: 1 Mod. 35. It has great regard to the usage and practice of the people, being nothing else but common usage, with which it complies and alters with the exigency of affairs: 2 Mod. 238. It does not adopt a rigid rule of morals, ill-suited to the state of society and the usual intercourse of mankind. It happily reconciles the claims of convenience with the duties of good faith, by requiring the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention, and even against his want of vigilance the purchaser may provide, by requiring the vendor expressly to warrant the property sold: 2 Caines, 55. Our decision must be governed by this common law in all cases wherein it may be applicable to our local situation, and where it has not been altered by the municipal acts of the legislature. We are not at liberty to remove the settled landmarks of property, although individually we may be dissatisfied with the policy of particular parts of the system or their abstract justice, when applied to special cases, which may forcibly strike our minds.

I proceed to consider the authorities which have been cited and relied upon by the defendant in error. I have already remarked on the position of Dr. Wooddeson that a fair price implies a warranty. *Seixas v. Woods* fully shows that it is not authorized by any judicial decision. *D'Utrecht v. Melchior*, 1 Dall. 428, was determined upon the ground of fraud and imposition. No lands could be found upon which the conveyance could operate, and the authority of the case itself has been much questioned in the supreme court of New York. *Moses v. Macferlan* has been impaired by the late decisions. The suit for money had and received was a favorite action of Lord Mansfield, but it has been stretched too far. The doctrine is too broadly laid down when it asserts, that wherever one man has money

which another ought to have, the latter may sustain a suit therefor, or that wherever a man has an equitable claim he has also a legal action. It is not universally true, that money can be recovered back when, by the ties of natural justice and equity, it ought not to be retained, and an instance is put by Lord Mansfield, in this very case, when he says, "it is most clear that the merits of a judgment can never be overhauled by an original suit, either at law or in equity." 2 Burr. 1009. It is not difficult to conceive that a judgment may have been rendered in a personal action, where injustice has been done, from the merits of the cause not being fully before the court, and the money paid thereon. What mode of redress does the wisdom of the law furnish on the occurrence of such an event?

Bingham v. Bingham, 1 Ves. 126, was grounded on the plain mistake of the party who purchased of another his own lands ignorantly; and fell properly within the jurisdiction of a court of equity. The *Anonymous case*, in 2 Cha. Cas. 19, is the strongest which has been cited for the defendant in error. The Lord Chancellor Finch relieved the complaint from the payment of the purchase-money, on an eviction of the lands by title paramount, although the vendor had covenanted only for himself and those claiming under him. The reporter has questioned the correctness of the decree, and whoever carefully reads the note in 1 Fonbl. 361, will be satisfied that it leads to the most serious inconveniences, by opening contracts at any distance of time, however guarded and bounded they may be in their terms. Sugden, in his *Law of Vendors and Purchasers*, has made some very pertinent remarks on this case, p. 315, 316.

Upon the other hand, we have express adjudications in our books that the rule of *caveat emptor* strictly applies to the purchase of lands, and that the consideration money cannot be recovered back after a deed executed, unless in cases of fraud, where some covenant inserted in the deed has been broken. The purchaser has it in his power to protect himself by proper covenants, and there is no reason why the law should provide to him a remedy, where he has himself been wholly inattentive and negligent in this particular: *Bolwell v. Vaughan*, Cro. Jac. 197; *Medino v. Staughton*, 1 Salk. 211. I feel myself almost at liberty to cite the strong case of *Bree v. Holbeck*, Doug. 630 (654), which has been more than once sanctioned by this court, and must, therefore, be considered as evidence of the law of this state. It was there resolved that a suit would not lie to recover back a sum of money paid in consideration of the assign-

ment of a mortgage, although it turned out to be a mere forgery. It was incumbent on the purchaser to look to the goodness of it. All the modern elementary writers have adopted the principles of this decision, and every prudent man conversant in land, regulates his conduct thereby. It, therefore, follows that however reasonable it may appear to us, that a man who conveys lands for an adequate consideration, without any special covenants in his deed, should be held bound to render compensation where the title proves defective, yet as the law is clearly otherwise, we are bound to acquiesce in its provisions. Let it be understood that my opinion goes no further than to the case immediately before the court, where the consideration money has been paid by the vendee, and he seeks to recover it back upon the title of the lands sold proving defective, without having apt covenants inserted in his deed for his security, and where no fraud can be ascribed to the vendor. The question appears to me very different under the uniform usage and practice of Pennsylvania, where the vendor seeks to compel the payment of the money by a suit upon his bond, although there is no covenant in the deed as to the title. That case has occurred in the Lancaster district at the last term, on a writ of error to Schuylkill county between *Stemhouser v. Witman*, has been fully argued, and is now *sub judice*. "Sufficient unto the day is the evil thereof." I am now of opinion that the judgment of the court below be reversed, and a new trial awarded.

BRACKENRIDGE, J., delivered a concurring opinion.

Judgment reversed.

WATSON v. BIOREN.

[1 SEDGWICK & RAWLE, 227.]

RIGHT OF WAY.—Where land is granted with a right of way, that right is appurtenant to every part of the land thereafter granted, no matter how small.

ACTION on the case for disturbing the plaintiff in his right of way, and for stopping his water-course. By deed, one Gordon and wife conveyed to the plaintiff a lot on the south side of Chestnut street, containing ten feet in front on that street, and running back seventy-five feet to a three-foot-wide alley which leads into Orphan's court or Carter's alley, with free and uninterrupted ingress, etc., in common with the owners and occupiers of the lots adjoining the same, and of a water-course over

and along the said three-foot-wide alley, from the premises to Orphan's court. The plaintiff conveyed to one Conyers all the said lot, except a small piece three feet wide by thirteen feet long, at the south-west corner of the lot, adjoining the alley. Conyers sold this lot to the defendant, who was owner of the adjoining ground on the east, and of the alley. The house and lot adjoining the first-mentioned lot on the west, also belonged to the plaintiff, as well as other property adjacent. The plaintiff had access from all the lots to the alley in question. A verdict was found for the plaintiff subject to the opinion of the court. Two questions were presented: 1. Whether the plaintiff, notwithstanding he had parted with the whole of the lot in which the alley was appurtenant, except the small piece of ground above described, retained the privilege of the said alley? 2. Whether the plaintiff had a right of way through the alley to his other lots?

Rinney, for plaintiff, maintained that the defendant was estopped to deny the plaintiff's right of way, because he had accepted a deed from Conyers, when he knew that the plaintiff's object in retaining part of the lot to which the alley was appurtenant, was to secure a passage through the alley to all his lots in that neighborhood: 10 Vin. 478, W. pl. 3; Id. A. A. pl. 6; Id. 485, B. A. pl. 15; 1 Salk. 276; *Palmer v. Ekens*, 2 Ld. Raym. 1551.

Levy, contra, cited 3 Bl. Com. 218, 241; 1 Lutw. 111, 119; 1 Mod. 190, 191; 2 Bl. Com. 326; 3 Wils. 234; 1 Saund. 323; *Lawton v. Ward*, 1 Ld. Raym. 75.

TILGHMAN, C. J., after having stated the different deeds, proceeded as follows: The defendant, who is proprietor of the alley, contends that the plaintiff has no right to the use of it, because he has parted with all the lot to which the right of way was appurtenant, except the small piece last mentioned. It may be remarked in the outset, that at all events the plaintiff must recover in this action, because the defendant has obstructed the water-course, and no argument whatever has been urged to show that the right to the water-course is lost by selling part of the lot. As to the right of way, the argument is that the deed should be construed according to the intent of the parties, and that it must have been supposed by the grantor that this small lot conveyed by Gordon to the plaintiff, only ten feet wide, would have been always occupied by one person; therefore the cutting it up into several parcels, and giving a right of passage

to several persons, will subject the grantor and those claiming under him to greater inconvenience than was contemplated. But we are to judge of the intentions by the words of the deed. When land is conveyed with a right to the grantee, his heirs and assigns, to pass over other land, the right is appurtenant to all and every part of the land so conveyed, and consequently every person to whom any part is conveyed is to enjoy the right of passage. It must not be supposed that either party was ignorant that the grantee had a right to alien a part, nor that it was the intention, unless clearly expressed, that by such alienation the right of way should be extinguished. Now if the defendant's argument is just, the right of way is totally extinguished by an alienation of a part of the premises, because it cannot be said that the owner of one part has better right than the owner of the other, consequently, as both cannot have the right, the whole is gone.

We must decide this case on general principles. The same law that is applied to a lot of ten feet wide must be applied to one of the width of an hundred feet. And it is obvious that such a principle cannot prevail in a city without intolerable grievance, because it would force every person who has a right of way to preserve his property entire, in order to preserve his passage. Generally speaking, covenants that run with the land extend to assignees of every part of the land. This is the case with covenants to warrants, etc., although by multiplying the assignees the actions against the covenantor may be multiplied. The defendant has produced no authorities distinguishing this case from the general principle. I am therefore of opinion that the plaintiff was entitled to the use of the alley in question, as appurtenant to the ground retained by him. But the plaintiff has another claim—he has another house and lot on Chestnut street, lying to the west of and adjoining the ten-feet-wide lot conveyed by Gordon, and having purchased several contiguous parcels of ground, so as to bring him in contact with the piece of three feet by thirteen, he supposes that he may, by passing from piece to piece of his own property, obtain the use of the alley in question for himself and his family, living in the last-mentioned house on Chestnut street. I do not think that the facts stated in the record make it proper to decide that point at present. But this I will say, that it is a question very different from the one now decided, and that it will require strong arguments to prove that a way appurtenant to one piece of ground can by any contrivance be made subservient to a passage to and

from another piece of land. On the whole, I am of opinion that judgment should be entered for the plaintiff.

YEATES, J., stated the several conveyances, and then proceeded: By these different conveyances it is perfectly clear, that the privilege of the alley leading to Orphan's court, granted to the defendant is subject to the right of passage through the same of the owners and occupiers of the adjacent lots, and consequently by the acceptance of the deeds, he is estopped from denying that right to them. This is abundantly shown by the cases cited on the argument.

But further, Gordon, who owned the whole of the lots to which the privilege of this alley was incident, by his deed of the eighteenth of December, 1805, conveyed a lot adjoining thereto, with the full privilege of the alley, and a water-course therein, to the plaintiff Watson, and when Watson afterwards made his conveyance to the aforesaid Conyers, as I have before stated, he excepted thereout a small portion of the ground adjacent to the alley. Now the settled rule and usage of the city being, that every fraction of a lot of ground to which a privilege is incident, legally participates in all the rights originally belonging to the whole lot, unless he thereby violates the rights of others by a trespass, or unless it be otherwise modified by special agreement, it follows as a matter of course, that the plaintiff is entitled to judgment on the verdict for the illegal acts of the defendant in obstructing his right of passage through the alley, and of the water-course therein.

BRACKENRIDGE, J., concurred.

Judgment for the plaintiff.

BARTON v. BAKER.

[1 SERGEANT & RAWLE, 384.]

NOTICE IN CASE OF INSOLVENCY.—Due notice of non-payment is not excused, because the maker of a note was insolvent when the note was made and indorsed, and also when it fell due, although the fact was known to the indorser.

NOTICE, WHEN UNNECESSARY.—But if the indorser has received from the maker a general assignment of his estate and effects, notice is not then necessary.

ASSUMPT by the plaintiff as indorsee of a note, against the indorser. The facts appear from the opinion. A verdict was found for the plaintiff, and a motion was made for a new trial.

Pilips, in support.

Tbd, *contra*.

TILGHMAN, C. J. The objection to the verdict in the case is, that due notice of non-payment by the maker of the note, on which the action is founded, was not given to the defendant who was the indorser. It is confessed that due notice was not given; but the plaintiff contends, that under the circumstances of the case, notice was not necessary. The circumstance principally relied on at the trial, and on which the plaintiff had the charge of the court in his favor is, that at the time when the note was made and indorsed, and also at the time when it fell due, it was known to the defendant that James Brown & Co. were insolvent. If the case rested solely on this objection, I should be for granting a new trial, because the cases cited by the plaintiff of *De Berdt v. Atkinson*, 2 H. Bl. 336; and *Cornay v. Da Costa*, 1 Esp. 302, have been overruled in *Nicholson v. Goulthit*, 2 H. Bl. 609; and *Esdale v. Sowerby*, 11 East, 114. The case of *Jackson v. Richards*, 2 Caines, 343, agrees with the law as settled by the last English cases. But I do not rest my opinion solely upon the authority of these cases. The reason of the thing demonstrates that the insolvency of the maker of a note, though known to the indorser, ought not to discharge the holder from giving notice. There are various degrees of insolvency and it rarely happens that a man is totally insolvent. So that there is a chance of getting something by an application to the debtor. Besides, if a man has nothing of his own he may have friends who, to relieve him from pressure, will do something for him. The indorser therefore has a chance of securing himself at least in part. The only reason that can be assigned for insolvency taking away the necessity of notice, is that notice could be of no use to the indorser. But it is almost impossible to prove that it might not have been of use. Therefore it is necessary. There is another circumstance in this case, however, operating powerfully in favor of the plaintiff. The house of James Brown & Co. consisted of James Brown and Armat Brown. When the note fell due James Brown was in Europe and Armat Brown in this city. A few months before it was due, the defendant received from Armat Brown an assignment of his whole estate, for the purpose, among other things, of indemnifying him against his indorsements on account of James Brown & Co. Now, by the taking of this assignment, it is not unreasonable to presume that the defendant took upon

himself the payment of the indorsed notes, especially as when he did receive notice, ten days after the note fell due, although he knew and remarked that it was out of time, he did not deny his responsibility, but said that his ability to pay would depend on the arrival of a vessel. I agree therefore with *Bond v. Farnham*, 5 Mass. 170 [4 Am. Dec. 47], where it was held that in such a case the indorser dispenses with notice. Inasmuch then as it appears upon the whole of this case, that notice of non-payment was not necessary, no injustice has been done by the verdict, and therefore a new trial ought not to be granted.

YATES, J. I have no hesitation in admitting that my charge to the jury, in the particular of notice to the defendant of the non-payment of the note by the drawers, does not accord with the most modern authorities. I considered the cases of *De Berdt v. Atkinson*, in 1794, 2 H. Bl. 336; and of *Cornay v. Da Costa*, in 1795, 1 Esp. 302, under circumstances very similar to those disclosed in evidence on the trial, as decisive of the question of notice, and that according to the expression of Buller, J., in the first case, the general rule as to notice was only applicable to fair transactions, where the note had been given for value in the ordinary course of trade.

The justice of the case in favor of the plaintiff struck my mind forcibly; and I thought *Nicholson v. Gouthit*, in 1796, 2 H. Bl. 609; and *Jackson v. Richards*, in 1805, 2 Caines, 343, might be admitted to be law, without overthrowing the two former decisions. In the first of them, 2 H. Bl. 610, it is stated that if the note had been presented when it became due, it would have been paid, as Burton, a prior indorser, had lodged a sufficient sum of money in the defendant's hands for that purpose, but which he paid away when he found the note did not come to him as he expected. It appeared to me very singular that although Eyre, chief justice, and Heath and Rooke, justices, sat in the common pleas, and decided both cases, the decision in *De Berdt v. Atkinson* was not cited nor adverted to in *Nicholson v. Gouthit*, if it established a different principle, either by the court or counsel, although nineteen months only had intervened. I was led to remark on the trial, that Chitty, who is generally deemed a very correct compiler, in his treatise on Bills and Notes, p. 87, 1 Lond. Ed., lays down the broad proposition, that the payee of a note indorsing it to give it currency, and knowing the insolvency of the maker at the time, cannot insist on the want of notice as a defense; and yet, though he cites *Nicholson v. Gouthit* in the following page, he does not

consider it as effecting any change in the commercial law before asserted. In the New York case, 2 Caines, 343, notice was given to the indorser of non-payment by the drawer, prior to any demand upon the drawer; and, consequently, the notice was null, as the drawer was not in default when he received notice.

I placed too much reliance on the circumstances detailed in the cases of 1794 and 1795, without sufficiently attending to the reasoning of the court therein, which is contradicted in the later cases. *Eadaile v. Sowerby*, in 1809, 11 East, 117, was not cited on the trial; but it is held therein by the whole court, that *Nicholson v. Gouthit* is so decisive an authority on this subject, that the court could not again enter into the discussion of the doctrine. It seems now settled, that notwithstanding it sounds harsh that a known bankruptcy should not be equivalent to a demand or notice, the rule as to both is too strong to be dispensed with. At the same time, I cannot see how the defendant can get over the late case of *Bond v. Farnham*, in 1809, 5 Mass. 170 [4 Am. Dec. 47]. In this instance, James Brown, one of the partners in the firm, when the note fell due on the fifth June, 1812, was in Europe, and had been there some time before. Armat Brown, the only resident partner in America, had assigned all his real and personal estate to the defendant, to indemnify him for his advances and indorsements. Against neither could any effective measures be pursued within the period of imputed delay. In the language of Chief Justice Parsons, "any demand by the defendant would be fruitless, as he had secured all the property the drawer on the spot had, for the express purpose of keeping him harmless." The reason of the rule as to notice must wholly fail, under such circumstances. On this last ground, I am of opinion that judgment be rendered for the plaintiff on the verdict.

BRACKENRIDGE, J., gave no written opinion, but said that the leaning of his mind was that notice was necessary.

New trial refused.

In a note to *Bond v. Farnham*, 4 Am. Dec. 47, the doctrine of this case is discussed. The case is reported in Redfield and Bigelow's *Leading Cases on Bills*, etc. See *Kiddell v. Ford*, 6 Am. Dec. 569, where a different doctrine, regarding notice in case of insolvency, is held in South Carolina.

CHRIST v. DIFFENBACH.

[1 SERGEANT & RAWLE, 464.]

PAROL EVIDENCE OF COVENANT OMITTED.—Parol evidence may be offered by a lessee showing that at the time a written lease was executed, the lessor agreed to perform and insert a certain covenant, which was omitted in the lease.

EVIDENCE OF FRAUD AND MISTAKE.—It is well settled that parol evidence is admissible in cases of fraud, and of plain mistake in drawing a writing.

ERROR to the common pleas, where Christ brought replevin for goods distrained for a year's rent. Issue was joined on the plea of no rent due. A lease was given in evidence by the defendants, executed by them on one part, and the plaintiff, for a mill and certain land, at a rent of four hundred and twenty dollars. The plaintiff offered to give evidence that at the time it was verbally agreed between him and the lessors that the latter should have the race of the mill dug deeper, and that this was to form one of the covenants in the lease. On the defendants assuring him that this should be done, the lease was executed. The plaintiff alleged the non-performance of this covenant, and in consequence thereof he had sustained damages more than the rent in arrear. The evidence was rejected, and a bill of exceptions taken.

Fisher, for the plaintiff in error.

Godwin, *contra*.

TILGHMAN, C. J. John Christ, the plaintiff in error, rented a mill and land of the defendants in error. The lease was in writing; and the question is, whether the parol evidence mentioned in the bill of exceptions was receivable? I am not for carrying parol evidence farther than is warranted by decisions which are binding on this court; but it is too late now to consider whether more good or harm has resulted from the admission of such evidence, in any case of writing. Without citing cases, or undertaking to enumerate all the exceptions to the general rule, it may be laid down as settled law, that parol evidence is admissible in cases of fraud, and of plain mistake in drawing a writing. The evidence offered in the present case went directly to establish a fraud. A certain rent had been agreed upon between the lessors and lessee, on an understanding that the lessors were to widen and deepen the tail-race of the mill, at their own expense. While the writings were drawing, the parties went to view the mill. When they came back

and were about to execute them, the lessee perceived that the clause respecting the tail-race was omitted. He objected to signing, but was induced to it, by the lessors' promise that they would do what had been agreed upon, in the months of June, July or August, next ensuing. Trusting to this, he executed the lease, and now the lessors say that they find nothing of the tail-race in the writing, and to that only they look. This is the case which the plaintiff offered to prove, and if established, was he not tricked into the execution of the lease? Or would such conduct be anything more or less than a downright fraud, on the part of the defendants? Whether the plaintiff could have made good his assertion, is not now to be inquired of; but undoubtedly he should have been allowed an opportunity of doing it. I am therefore of opinion that the judgment should be reversed, and a *venire facias de novo* awarded.

YATES, J. I have always understood the settled law in this government since the decision in *Hurst's Lessee v. Kirkbride*, cited in 1 Binn. 616, to be that whatever passed at, and immediately before the execution of any instrument, might be given in evidence to impeach the fairness of the transaction. It was bot-tomed on the decision of *Harvey v. Harvey*, 2 Oha. Ca. 180, that a court of equity would receive parol evidence of the declarations made before a deed was executed, to show its real design and character. The present case is in fact much stronger than *Hurst's Lessee v. Kirkbride*. There, the conversations of the parties which were permitted to be detailed went to narrow down and restrain the general and comprehensive words in the deed of all the grantor's lands in Pennsylvania and elsewhere in America. The parol evidence was permitted even to contradict the conveyance upon the ground of fraud. Here, a fraud is also attempted, for the lessee objected to execute the lease, until he received assurances from the lessors that the tail-race of the mill should be dug out in a certain manner to void the water, at their expense, and that it made no difference to him whether a covenant to that effect was inserted in the deed or not. But a contract of this nature might well stand with the expressions in the lease, and does not contradict it. I will only add in the language of Lord Hardwicke, in *Baker v. Paine*, 1 Ves. 457, how can a mistake in an agreement be proved but by parol evidence? It is not read to contradict the face of the agreement, which the court would not allow, but to prove a mistake therein, which cannot otherwise be proved.

I think the parol evidence ought to have been allowed to go

to the jury; and, therefore, the judgment should be reversed, and a *venire facias de novo* awarded.

BRACKENRIDGE, J., concurred.

Judgment reversed, and a *venire facias de novo* awarded.

In a note to *Thompson v. White*, 1 Am. Dec. 252, attention was drawn to the fact that the decisions in Pennsylvania have carried the admission of parol evidence further than those of any of our courts. This statement is confirmed by a recent decision in that state, *Lippincott v. Whitman*, 83 Pa. St. 244, where Paxon, J., delivering the opinion, says: "The rule is well settled in Pennsylvania that where equity would reform or set aside a written instrument on the ground of fraud, accident, or mistake, parol evidence is admissible to contradict or vary the terms of the agreement as written: *Christ v. Dissenbach*, 1 S. & R. 464; *Iddings v. Iddings*, 7 Id. 111; *Miller v. Henderson*, 10 Id. 290; *Parke v. Chadwick*, 8 W. & S. 96; *Clark v. Partridge*, 2 Barr. 13; *Renshaw v. Gans*, 7 Id. 117; *Rearick v. Swinehart*, 1 Jones, 233; *Martin v. Berens*, 67 Pa. St. 459; *Kostenbader v. Peters*, 2 Weekly N. 531. An exception to the rule exists in the case of commercial paper, which, for reasons of public policy, cannot be impeached in this way."

STEIGLEMAN v. JEFFRIES.

[1 SERGEANT & RAWLE, 477.]

DAMAGES FOR BREACH OF WARRANTY, SET-OFF.—In an action for the price of articles sold, the defendant, by way of equitable defense, may give evidence of a warranty of the articles, and a breach thereof, without his having offered to return the articles, or his having given notice to the plaintiff to take them away.

ERROR to the common pleas, where an action on a promissory note was brought by Jeffries, against Steigleman. The note was given for a quantity of burr stones sold by the plaintiff to the defendant. *Non-assumpsit* was pleaded, and notice of special matter in evidence that the plaintiff would prove a warranty that the stones were of good quality, which warranty was broken. The jury were instructed that although there was a warranty, yet the defendant could not avail himself of it in this action, unless he had returned the stones, or given notice to the plaintiff to take them away. To this the defendant excepted, and the question on this point was presented to the court.

Fisher & Duncan, for plaintiff in error.

Elder & Hopkins, contra.

TILGHMAN, C. J. By the law as held in England, it seems to be settled that the purchaser who has a warranty which is

broken, may either avoid the contract by returning the article purchased, or suffer it to exist, and seek redress by action on the warranty. But if he keeps the goods and is sued for the price agreed on, he cannot defend himself by force of the warranty. Neither can he make use of the warranty by way of set-off, because a demand of that kind is not within the English statute of set-off: Our defalcation act is more extensive than the English, and permits the defendant, on plea of payment, to give in evidence any bond, bill, receipt, account, or bargain, by virtue of which he has a claim against the plaintiff. It has been held: 1 Sm. L. 51, note; 2 Dall. 237; *Kachlin v. Mulhal-lon*, that the right of set-off, under this set, does not embrace a claim of unliquidated damages for any matter in nature of a tort, because in such cases there is no standard by which the damages can be estimated: 1 Sm. L. 52, note, *Sweitzer v. Garber*.

But in the present case the objection is not so strong. The amount of damages, to be sure, cannot be reduced to a certainty, but the price agreed to be paid, for the article purchased, is some rule to assist in making the estimate; it is a boundary beyond which the damages cannot be reasonably suffered to pass.

Where the cause of action which the defendant wishes to set off, arises from the same transaction on which the plaintiff founds his action, there is great convenience in having both decided by the same jury. It saves expense, avoids multiplicity of suits, and can do no injury to the plaintiff, because having received notice by the defendant's plea, he may defend himself with as much advantage in that form as if he answered to an action brought on the warranty. Considering then that the case falls within the words of our defalcation act, which has been extended by a very liberal construction in practice, I am of opinion, that the defendant might have taken advantage of the warranty, without retaining the stones, or giving notice to the plaintiff to remove them. The judgment must, therefore, be reversed, and a *venire de facias de novo* awarded.

YEATES, J. In England this defense could not be set up in a court of law. In the light of a set-off it would not be received, because the damages intended to be defalcated would be considered as unliquidated. The buyer would be left to his action on the warranty. In Pennsylvania, it has been often remarked, that our defalcation act is much more comprehensive than the British statutes of set-off. The defendant may plead payment of all or part of the debt or sum demanded, and give any bond,

bill, receipt, account or bargain in evidence. Our thirty-ninth rule of practice contains such provisions as prevent all surprise. I still, however, adhere to the opinion which I delivered at *nisi prius* in *Kachlin v. Mulhallon*, 2 Dall. 237, that unliquidated damages in covenant, sounding merely in tort, cannot be defalcated under our system of judicial proceedings. In such cases individual feelings determine the *quantum* of compensation without any known standard. That objection does not occur here. If the burr stones were of so bad a quality as to be wholly useless in the hands of the vendee, it would operate against a recovery of any part of the sum agreed upon. If they were of so inferior grade as that the mill stones would not sell for above two thirds or one half of the sum which good mill stones would command at a fair market, the sum recovered would naturally be in the same proportion, so that there would be some rule of estimating the injury sustained. I concur with the chief justice in *Murray v. Williamson*, 3 Binn. 137, that I would gladly embrace every principle which prevents multiplication or circuity of action. The alleged defense here springs out of the transaction which gave birth to the promissory note. The plaintiff in error complains of a breach of contract for which he might maintain *assumpsit*. It is not such a tort as would die with the person. I take it that the law is laid down too broadly in the charge of the court. Circumstances might be laid before the jury fully accounting for not returning the stones to the seller or giving him notice to take them away at his own expense, and the prejudice which might otherwise arise against the cause of the buyer might thus be in a great measure done away. How far the buyer has recognized the justice and fairness of the sale by his conduct was a matter of fact to be determined by the jury. I am of opinion that the judgment be reversed and a *venire facias de novo* awarded.

BRACKENRIDGE, J., concurred.

The construction given to this case in the courts of Pennsylvania appears from the opinion of Bell, J., in *Price v. Lewis*, 17 Pa. St. 53, where he says: "In 1 Serg. & R. 477, *Steigleman v. Jeffries*, the action was upon a promissory note, given as the price of certain burr stones, which the plaintiff had averred to be of good quality. On the trial the defendant was admitted to prove, by way of equitable defense, that the stones were not of the quality warranted. To the objection that this defense sounded in unliquidated damages, and consequently came within the principal ruled in *Kachlin v. Ralston*, the court answered that the cause of action which the defendants wished to set-off arose from the same transaction in which the plaintiff founded his

action, and the character of the damages opposed no insuperable objection, for, if the stones were of so bad a quality as to be wholly useless, no part of the sum agreed as their price could be recovered, but if only of an inferior grade, but still of some value, the amount of the verdict would be determined by the price they would bring in a fair market. Although a cursory examination of this case might induce the belief that the defense was received as a matter of set-off, a close scrutiny will show it proceeded from the broader basis of equitable defense, springing from fraudulent misrepresentation and consequent failure of consideration, and it is accordingly so classed in *Heck v. Shener*, 4 Serg. & R. 249, and *Gogel v. Jacoby*, 5 Id. 117, being there cited as illustrative of the doctrine recognised in those cases.

SCOTT v. PRICE.

[3 SERGEANT & RAWLIN, 59.]

LEGACY, WHEN VESTS.—A legacy payable in installments after the legatee arrives at the age of eighteen, and in case she dies before attaining the age of twenty-one years, unmarried or without lawful issue, then, or in either case, over, is vested absolutely in the legatee upon her arriving at the age of twenty-one, although she died soon after without issue.

EXECUTORY DEVISE OF MONEY.—Money may be the subject of an executory devise and the limitation over after failure of issue is not too remote if restricted to the death of the first taker.

ERROR to the court of common pleas. Josiah Price, the defendant in error, brought his action against Scott, executor, to recover a legacy bequeathed by the testator to his daughter, Sarah, Josiah's wife, now deceased. The clause under which the plaintiff below claimed was: "Likewise, I will and bequeath unto my daughter, Sarah Scott, her heirs and assigns, my negro girl named Hannah, and the one third part of my household furniture, a horse and saddle of the value of thirty pounds, as also five hundred and fifty pounds specie, to be paid to her in yearly payments, viz.: one hundred pounds yearly, after she arrives at the age of eighteen years, until the said five hundred and fifty pounds be paid." The will also contained the following: "It is further my will, that if it should please God that any or either of my before-mentioned sons or daughters should die before he or she, or they, attain the age of twenty-one years, unmarried or without lawful issue, that then, or in either case, the bequest or bequests hereinbefore made to any or either of them, shall devolve to the survivors or survivor, to be divided share and share alike; and in case it should happen that my said sons and daughters should all so die under age and without lawful issue, that then and in such case my whole

estate real, before divided, shall descend to my brother James Scott's son Alexander."

Sarah Scott was about nine years old when the testator died. After arriving at the age of twenty-one years, she married the plaintiff Price, and in a few months died without issue. Judgment for the plaintiff.

Riddle and Duncan, for the plaintiff in error, contended that the contingency of Sarah's dying without issue had happened, and the limitation over had become effectual. A limitation over by way of executory devise, is good as regards personal property: 1 *Fearne Cont. Rem.* 26, 30; 2 *Id.* 1, 33, 35, 49, 227, 239. The courts favor devises over: 2 *Vern.* 337; 3 *Burr.* 1634; *Sheffield v. Lord Orrery*, 3 *Atk.* 282; *Maddox v. Staines*, 2 *P. Wms.* 422; *Sheppard v. Lessingham*, *Amb.* 122; 1 *P. Wms.* 664; 3 *Mass.* 3.

Dunlop and Chambers, contra.

TILGHMAN, C. J. This is an action brought by Josiah Price, the husband and administrator of Sarah Price, deceased, for the recovery of a legacy bequeathed to the said Sarah by the will of her father, William Scott.

The question is whether the legacy were vested absolutely in Sarah Price, or went over on her death to her surviving brothers and sisters. [His honor here read the material parts of the will.] An executory devise of a chattel to take effect after an indefinite failure of issue would be void, the contingency being more remote than the law permits. It is granted, however, by the counsel for the defendant, that the contingency mentioned in this will is not too remote, because the dying without issue is not indefinite, but restricted to the time of the death of the first taker. But a question has been made whether money can be the subject of an executory devise; of this I entertain no doubt. A sum of money devised to one for life, with remainder to another, may be of great use to the first taker; he may put it to interest or invest it in goods or land, and thus make profit. All that is required is, that on his death his executors pay the principal to the remainderman. Money has this peculiar advantage over other chattels that the use of it occasions neither loss nor injury, and from time it suffers no decay. The executors of the first taker are not bound to pay over the identical pieces of metal which their testator received, but the like value in lawful money of the country. It was once supposed that a gift of a chattel for an instant was a gift forever, and

that any limitation over would be void. But since the law of executory devises has been established, there has been no difference between money and any specific chattel.

The only difficulty in this case, if there be a difficulty, is to ascertain what was the contingency on which the testator intended that this legacy should go over. From his direction that it should be paid in yearly installments of one hundred pounds after his daughter arrived at the age of eighteen, and from this being the only provision which he has made for her, it may be presumed that it was not his intention to hold it long in suspense. Nor can it be supposed that in case Sarah had died before twenty-one, leaving issue, it was her father's will that her children should be deprived of this money. This reflection is so natural and so pressing, that in similar cases, and many similar cases have occurred, no judge has failed to be impressed with it. The law has, therefore, been settled, that where a legacy is given to one, and if he should die before twenty-one, or without issue, then to another, it becomes absolutely vested in the first taker on his arrival at the age of twenty-one. If the devise in this will had been simply that in case of the death of either of the testator's sons or daughters, before attaining the age of twenty-one years, unmarried or without issue, the legacy bequeathed to the one so dying should go over, I presume it would not have been contended that it would have gone over, upon a death after the age of twenty-one. The cases decided upon that point are too strong to be got over. I need only to refer to *Holmes v. Holmes*, 5 Binn. 252, where the law was fully considered.

But the defendants rely on the subsequent expressions, "then and in either case," which they say manifest the clear intent of the testator that the three contingencies before mentioned should be construed disjunctively, that is to say, that the legacy should go over on Sarah's dying before twenty-one, or unmarried, or without issue. It must be confessed, that without rejecting the words "in either case," which I have no right to do, I know not how to construe all the three contingencies conjunctively. Some separation is necessary to satisfy the word either, which must have reference to more than one. But still I cannot suppose that the testator intended to take the money from his daughter in case she died before twenty-one, leaving issue. I must, therefore, seek for a construction which may preserve the legacy to the daughter's family upon that event, and at the same time to give effect to the word either. And I think

such a construction may be found. The words of the will are: "in case either of my before-mentioned sons or daughters should die before he, she, or they, attain the age of twenty-one years, unmarried or without lawful issue," etc. I construe them thus: In case either of them die before he attain the age of twenty-one years unmarried, or before he attains the age of twenty-one years without lawful issue; this makes two cases on contingencies to which the word either may refer; it vests the legacy absolutely on the child's attaining the age of twenty-one, and it preserves it in case of a death before twenty-one leaving issue.

In my opinion, it comes nearer to the testator's meaning than any other construction which can be made, without taking greater liberties with words of the will than any court has a right to take. I shall, therefore, adopt it. It appears, then, from the facts stated, that this legacy was vested absolutely in Sarah, the wife of the plaintiff, because she died after the age of twenty-one. Consequently, the judgment of the court of common pleas was right, and should be affirmed.

YEATES, J., absent.

BRACKENRIDGE, J., concurred.

Judgment affirmed.

As to an executory devise of money being good when the contingency of the failure of issue is restricted to the death of the first taker, this case is approved in *Dehl v. King*, 6 Serg. & R. 31; and *Rapp v. Rapp*, 6 Pa. St. 49.

See *Williams v. Dickerson*, 1 Am. Dec. 66, for a construction of a limitation in a will similar to that in the principal case. As to a remainder over of personal property being valid, see note to *Smith v. Gates*, Id. 89; and *Gripps v. Dodge*, 2 Id. 82.

COMMONWEALTH v. SHARPLESS.

[2 SERGEANT & RAWLE, 91.]

EXHIBITING OBSCENE PICTURES.—The exhibition of an obscene picture is an offense tending to the corruption of morals, and is indictable at common law.

INDEX.—FORM OF INDICTMENT.—An indictment for such an offense need not charge that the exhibition was public; it will be sufficient to state that the picture was shown to sundry persons for money. Nor is it necessary that the picture be minutely described; it will be sufficient if the description will enable the jury to identify the picture with that produced in evidence.

IDEM—THE OFFENSE NOT A NUISANCE.—The indictment need not lay the house in which the picture was exhibited to be a nuisance, as the offense is not a nuisance, but one tending to the corruption of morals.

INDICTMENT for exhibiting an obscene picture. The case appears from the opinion.

Browne, for the defendants.

E. Ingersoll and Ingersoll, Attorney-general, *contra*.

TILGHMAN, C. J. This is an indictment against Jesse Sharpless and others, for exhibiting an indecent picture to divers persons for money. The defendants consented that a verdict should go against them, and afterwards moved in arrest of judgment for several reasons.

1. "That the matter laid in the indictment is not an indictable offense." It was denied, in the first place, that even a public exhibition of an indecent picture was indictable; but supposing it to be so, it was insisted that this indictment contained no charge of a public exhibition. In England, there are some acts of immorality, such as adultery, of which the ecclesiastical courts have taken cognizance from very ancient times, and in such cases, although they tended to the corruption of the public morals, the temporal courts have not assumed jurisdiction. This occasioned some uncertainty in the law, some difficulty in discriminating between offenses punishable in the temporal and ecclesiastical courts. Although there was no ground for this distinction in a country like ours, where there was no ecclesiastical jurisdiction, yet the common law principle was supposed to be in force, and to get rid of it, punishments were inflicted by act of assembly. There is no act punishing the offense charged against the defendants, and therefore the case must be decided upon the principles of the common law. That actions of public indecency were always indictable, as tending to corrupt the public morals, I can have no doubt, because even in the profligate reign of Charles II., Sir Charles Sedley was punished by imprisonment and a heavy fine for standing naked in a balcony in a public part of the city of London. It is true that besides this shameful exhibition, it is mentioned in some of the reports of that case, that he threw down bottles containing offensive liquor among the people.

But we have the highest authority for saying that the most criminal part of his conduct, and that which principally drew upon him the vengeance of the law, was the exposure of his person. For this I refer to the opinion of the judges in the

Queen v. Curl, 2 Str. 792; Lord Mansfield, in the *King v. Francis Blake Delaval, etc.*, 3 Burr. 1438; and of Blackstone in the fourth volume of his Commentaries, page 64. Neither is there any doubt that the publication of an indecent book is indictable, although it was once doubted by the court of king's bench, in the *Queen v. Reed*, in the sixth year of Queen Anne. But the authority of that case was destroyed, upon great consideration, in the *King v. Curl*, 1 George II: 2 Str. 788. The law was in *Curl's case* established upon true principles. What tended to corrupt society was held to be a breach of the peace, and punishable by indictment. The courts are guardians of the public morals, and therefore have jurisdiction in such cases. Hence it follows that an offense may be punishable, if in its nature and by its example it tends to the corruption of morals, although it be not committed in public. In the *King v. Delaval, etc.*, there was a conspiracy, and for that reason alone the court had jurisdiction, yet Lord Mansfield expressed his opinion, that they would have had jurisdiction from the nature of the offense, which was the seduction of a young woman under the age of twenty-one, and placing her in the situation of a kept mistress, under the pretense of binding her as an apprentice to her keeper, and he cited the opinion of Lord Hardwicke, who ordered an information to be filed against a man who had made a formal assignment of his wife to another person. In support of this, we find an indictment in Trem. Pl. 213, *The King v. Dingley*, for seducing a married woman to elope from her husband. Now, to apply these principles to the present case. The defendants are charged with exhibiting and showing to sundry persons, for money, a lewd, scandalous and obscene painting. A picture tends to excite lust as strongly as a writing, and the showing of a picture is as much a publication as the selling of a book. Curl was convicted of selling a book. It is true the indictment charged the act to have been in a public shop, but that can make no difference. The mischief was no greater than if he had taken the purchaser into a private room and sold him the book there. The law is not to be evaded by an artifice of that kind. If the privacy of the room was a protection, all the youth in the city might be corrupted by taking them one by one into a chamber, and there inflaming their passions by the exhibition of lascivious pictures. In the eye of the law this would be a publication and a most pernicious one. Then, although it is not said in the indictment, in express terms, that the defendants published the painting, yet the aver-

ment is substantially the same, that is to say, that they exhibited it to sundry persons for money; for that in law is a publication.

2. The second reason in arrest of judgment is that the picture is not sufficiently described in the indictment. It is described as a lewd and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman. We do not know that the picture had any name, and therefore it might be impossible to designate it by name. What then is expected? Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records. These are circumstances which may be well omitted. Whether the picture was really indecent, the jury might judge from the evidence, or if necessary, from inspection. The witnesses could identify it. I am of opinion that the description is sufficient.

3. The third and last reason is, that the indictment does not lay the defendants' house to be a nuisance, or the act of the defendants to be to the common nuisance of all the citizens, etc. The answer is plain. It is not an indictment for nuisance, but for an action of evil example, tending to the corruption of the youth, and other citizens of the commonwealth, and against the peace, etc. In describing an offense of this kind, the technical word nuisance would have been improper. My opinion is, that the indictment is good, and therefore the judgment should not be arrested.

YEATES, J. I perfectly concur in the sentiments expressed by Sir Philip York in the case of *King v. Curl*, 2 Stra. 790, that although every immoral act, such as lying, etc., is not indictable, yet where the offense charged is destructive of morality in general, where it does or may affect every member of the community, it is punishable at common law. The destruction of morality renders the power of the government invalid, for government it is no more than public order. It weakens the bands by which society is kept together. The corruption of the public mind in general, and debauching the manners of youth in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences, and in such instances courts of justice are, or ought to be, the schools of morals. So far from the law of England being changed on this point by modern decisions, we find in the case of the *King v. Wilkes*, in 1770, 4 Burr. 2527, who was convicted on an information for an obscene and impious libel, called an *Essay on Woman*, the present objection was not taken by

his counsel. The wicked intention of the defendants, the exhibition of the obscene painting for money to persons unknown, and the effects of such scandalous conduct, are facts found by the jury, and I cannot bring my mind to doubt, for a single moment, that the offense charged, falls within cognizance of a court of criminal jurisdiction.

The defendants' counsel have objected, that should the acts charged against them, constitute an offense at common law they are not laid with sufficient legal certainty, and that it may so happen that different evidence may be given to the grand and traverse jurors for the same offense. To this it has been properly answered, that the same difficulty may occur in many indictments, as for assaults and batteries where there have been several breaches of the peace at different times by the party charged, and only one indictment has been preferred against him. As to the defendant being twice punished for the same offense, I see no danger whatever. If one obscene scandalous picture alone has been exhibited to view, whether on canvas, paper, or parchment cannot be material, a conviction or acquittal on the present indictment may be pleaded in bar to a future prosecution. If more than one such picture has been exhibited they may prove the truth of their plea of *autrefois convict* or *acquitt*, by showing the evidence of the specific charge made against them on their trial. The same seeming difficulty may arise in a charge of felony laid in stealing a bay horse of A. B., which surely would be sufficiently certain, without laying the particular natural marks of the horse, and yet if A. B. had more than one bay horse which had been stolen, the same objection might have been made as is now taken.

This indictment has evidently been framed from the precedent in Dougherty's Cro. Circ. Comp. 315, for exposing to sale an obscene print which it minutely follows, except so far as the clerical character is attacked, and laying the act to have been done in an open public shop of the defendant, in exposing it to J. N., etc. The precedent relied on stated the exposure of the objectionable print to a single individual in an open and public shop. But here the infamous and obscene painting was exhibited and shown for money in a certain house to persons unknown to the inquest. The question then in this part of the case is narrowed to a single point: whether the exhibition of a lewd, wicked, scandalous, infamous, and obscene painting representing, etc., to certain individuals in a private house, for money, is dispunishable by the sound principles of common

law? On this question I cannot hesitate. It is settled that the publication of a libel to any one person renders the act complete: 4 Bl. Com. 150. No man is permitted to corrupt the morals of the people. Secret poison cannot be thus disseminated. A slight knowledge of human nature teaches us "that while secrecy is affected in a case like the present, public curiosity is more strongly excited thereby, and that those persons who may ignorantly suppose they have had the good fortune of seeing bawdy pictures, will not content themselves with keeping the secret in their own bosoms." Unless we shall consider the conduct of the defendant justifiable and lawful in the present instance, the indictment is supportable if it alleges the offense as it really and in truth was committed.

As to the nature and manner in which the painting is represented to have been made, I hold it to be sufficient to state that it represented a man in an obscene, impudent, and indecent posture, with a woman either clothed or unclothed, without wounding our eyes or ears, with a particular description of their attitude or posture. Why should it be so described? If the jurors are satisfied on the proof that the persons represented were painted in an impudent and indecent posture, will not this give the court all the information they can require? Some immodest paintings, it is true, may carry grosser features of indecency than others, and in fact may produce disgust in the minds even of the most debauched, yet if the painting here tended to the manifest corruption of youth and other citizens, and was of public evil example to others, I think it sufficiently described. As to the exception that the indictment does not say that the defendants have been guilty of a common nuisance, it suffices to remark that the offense is not alleged as a nuisance, but as a libel on the morals and government of the state in the same manner as was done in the case of Wilkes for his *Essay on Woman*.

Upon the whole, I am of opinion that the motion in arrest of judgment be overruled, and that judgment be rendered on the verdict.

BRACKENRIDGE, J., concurred, but was absent, through indisposition, when the opinions were delivered.

Motion in arrest of judgment overruled, and judgment on the verdict.

KINGSTON v. WHARTON.

[2 SEDGWICK & RAWLE, 208.]

DEBTS NOT BARRED BY DISCHARGE.—Where a debtor, upon the eve of bankruptcy, promises to pay the debt when he shall be able, his certificate of discharge will be no bar to an action on the promise, such promise being conditional, and the debt arising from it not provable under the debtor's commission.

It appeared that on the twelfth December, 1800, the defendant executed his promissory note, which the plaintiff indorsed for his accommodation, and was subsequently obliged to pay. On the twenty-ninth of the same month, the defendant wrote a letter to plaintiff, saying that he would not be able to pay the note when it became due, and declared, "the moment I am able to relieve you, I will." A commission of bankruptcy issued against the defendant in March, 1801, after the note had become due and paid by plaintiff; and defendant was discharged in May following. The plaintiff did not prove any debt under the commission, but brought this action on the promise to pay when defendant was able. It was admitted that defendant was able at the commencement of the suit.

Verdict for the plaintiff, subject to the opinion of the court.

J. R. Ingersoll, for the plaintiff.

Hallowell and Rawle, for the defendant. The debt was discharged by the proceedings in bankruptcy. The plaintiff should have proved the debt under the commission; he was under no engagement not to do so. If the promise was founded upon an agreement on the part of the plaintiff to withdraw his opposition to the defendant's discharge in bankruptcy, it would have been void: *Smith v. Broomley*, 2 Doug. 696; *Summers v. Brady*, 1 H. Bl. 647; *Cockshott v. Bennett*, 2 T. R. 763; *Spencell v. Spiller*, 1 Atk. 105.

TILGHMAN, C. J. The plaintiff did not prove any debt under the commission, and the objection to his recovery in this suit is, that the debt was discharged under the commission. Every debt which was due or owing, at the time the defendant became bankrupt, or which might have been proved under the commission, was discharged. But it is contended by the plaintiff that the debt on which this suit is brought, was not then due, nor could it be proved under the commission, that the promise was contingent; and if the defendant had never been able to pay, no action could have arisen. This principle is supported by

the case of *Besford v. Saunders*, 2 H. Bl. 116, where it was held that in an action on a promise of this kind, the plaintiff must prove the defendant's ability. But the defendant insists that the plaintiff kept the note for one thousand dollars in his possession, and might have proved it under the commission, and therefore the contingent promise was of no validity. If it were necessary, the facts in this case would warrant the conclusion that the plaintiff had agreed not to prove under the commission, and then I see nothing in the way of his recovery.

Such an agreement would have been for the advantage of the other creditors, and the defendant himself could have nothing to say against it, because it only obliged him to do what he was under a moral obligation to do, without it. I take for granted that there was no collusion between the plaintiff and the defendant to the prejudice of the other creditors. If a creditor, knowing that the bankrupt had been guilty of an act which would debar him of the benefit of a certificate, should agree to keep it secret, in order that the bankrupt might obtain his discharge, any promise founded on that consideration would be void, because the agreement is fraudulent, and prejudicial to the other creditors. But where everything is fair, and the creditors agree to take no dividend under the commission, in consideration whereof the bankrupt makes a new promise to pay the debt, such promise is binding. This was decided in *Trueman v. Fenlon*, Cowp. 544. The only answer attempted to be given to that case is, that the promise was made after the act of bankruptcy committed. But that is not material, because the promise in the present case, although made before the bankruptcy, gave no cause of action till after. It was once doubted whether a new promise by a bankrupt, after obtaining his certificate, was binding; but it has been long settled that it is binding, because the moral obligation to pay continues, notwithstanding the discharge, and that obligation is sufficient consideration for a new promise. I have said that the facts in this case would warrant the conclusion that the plaintiff had agreed not to prove his debt, under the commission. But to put the matter in the strongest point of view for the defendant, let us suppose that the plaintiff had not so agreed. The defendant's letter may be fairly construed as follows: I am sorry for the inconvenience I have thrown upon you, by procuring your indorsement of my note on the eve of bankruptcy. I am about to become a bankrupt. Take up the note, and I promise that, as soon as I am able, I will indemnify you, by paying the balance which shall be due, after

you have received your dividend from my estate, or the whole, in case you do not prove the debt under the commission. I ask what objection there is to the validity of such promise? Is not the moral obligation as strong before the act of bankruptcy as after, or does the new promise go beyond the bounds of the moral obligation? And if not, how can it be said that a good consideration is wanting? It is objected that such a promise would be a fraud on the bankrupt law, which intended that the bankrupt should be discharged from all his debts. But I cannot perceive the fraud. The bankrupt law intended to discharge the debtor from all his debts if he chose it, but not force a discharge upon him. If the discharge was to be absolute and against the bankrupt's will, a new promise made after the bankruptcy would be void.

It is objected also that it would be dangerous to establish such promises, because unfortunate persons might be induced to make them in order to avoid opposition to their discharge. Every case must depend on its own circumstances. How far a promise would be good, made in consideration of not opposing a bankrupt's discharge extorted from him under hard circumstances, it is unnecessary to determine, because it is not pretended that the plaintiff took any advantage of the defendant's necessities, or exacted, or even asked any promise. The promise, such as it was, proceeded altogether from the defendant, and seems to have flowed from his own sense of justice. A new promise by a bankrupt, in consideration of his creditors, signing his certificate, is made void in England by act of parliament: 5 Geo. II., c. 30, sec. 11. But Lord Mansfield, in the case of *Trueman v. Fenton*, Cowp. 550, supposes that before that act such a promise was good, and lays great stress on it, in support of his opinion in that case. Upon the whole, then, it appears that the promise on which this action is founded, was not absolute, but conditional; that the condition has been performed by the defendant's acquisition of property sufficient to pay the debt; that the promise is supported by a good consideration, and that the debt arising from it could not be proved under the defendant's commission. I am, therefore, of opinion, that the plaintiff is entitled to recover.

YEATES, J. Of the honesty and equity of the plaintiff's demand there can be no doubt. The plaintiff indorsed a note for the defendant, three months before his bankruptcy, merely for his accommodation, and has paid it upon its being discounted at the late Bank of the United States, and protested afterwards.

The defendant, within six weeks before it became due, writes to him that it would not be in his power to take up the note, but assures him that the moment he was able to relieve him he would so do. The ability of the defendant to pay the money advanced for him, was admitted on the trial. The sole question is, whether the certificate of bankruptcy granted to the defendant, shall bar the plaintiff's claim?

I was at first struck with the circumstance that the plaintiff having paid the note at the bank after it became due, and before the defendant had applied to commissioners for the benefit of the bankrupt act, the debt became absolute, and he might then have instituted a suit for the recovery of the money, or proved it afterwards under the commission. But the case of *Cotterel v. Hooke*, 1 Doug. 97, satisfies me on this point. Where there was a bond and also a deed of covenant to secure an annuity, although the bond was forfeited before a discharge under the insolvent act of 16 Geo. III., c. 38, the party might be sued on the covenant for payments becoming due after the discharge. The words of that statute much resemble the thirty-fourth section of the bankrupt law of congress of the fourth April, 1800. Lord Mansfield said he took the case of a bankrupt and insolvent-debtor, as to this point, to be the same. When a man has two remedies he may elect. If the plaintiff had made use of the penalty, the case would have been different, but as he had not, he might proceed as often as he pleased for breaches of the covenant. We may here presume that the plaintiff acquiesced in the assurances given him that the money should be repaid to him in case of the defendant's future ability to do so. He threw no obstacles in his way to prevent his obtaining the benefit of the bankrupt law, and I can see no reason why a promise founded on a good moral consideration, made prior to a discharge under the bankrupt law, subject to a contingency, should not be equally obligatory as a promise made subsequent to such discharge.

The cases cited on the argument fully show that a promise to pay when able, is a contingent debt, and not absolute until the happening of the event. The ability must be ascertained by proper proof upon trial. It has been objected that a promise made by one who contemplates a bankruptcy in favor of one creditor, is injurious to the interests of the general creditors—opposed to the policy of the laws, and therefore void. But here the promise not only did not operate disadvantageously to the other creditors, but was beneficial to them. The plaintiff's not

proving his debt under the commission, necessarily had the effect of increasing the dividends of those who did claim. So far from undue and oppressive terms being exacted by the plaintiff in the distressed situation of the defendant, it appears to have been the spontaneous and unsolicited act of the latter when he wrote the letter on which this suit is founded. No case has been shown that a promise made to pay a debt binding in morality and good conscience on the party making it, when at a future day he shall be of sufficient ability to pay it, has been adjudged illegal, and therefore I am of opinion that judgment should be entered on the verdict for the plaintiff.

BRACKENRIDGE, J., concurred.

Judgment for the plaintiff.

See this case cited in *Lerow v. Wilmarth*, 7 Allen, 465, where a new promise in writing to pay a debt, made after the commencement of proceedings in insolvency, and before the granting of a certificate of discharge, was held binding.

GRAY v. WALN.

[3 SERGEANT & RAWLE, 232.]

VOLUNTARY STRANDING.—Where a vessel is voluntarily run ashore with the intent to preserve the ship and cargo as far as possible, and the vessel is in consequence lost, the loss is to be repaired by general average.

PRO RATA FREIGHT, WHEN DUE.—Freight is due *pro rata* when the consent of the merchant, either by words or actions, has been expressly given, or may fairly be inferred, to accept his goods at an intermediate port.

RULE FOR VALUATION OF SHIP.—The value of a vessel lost under circumstances which entitle her to contribution in general average, is to be estimated at the price she would have borne in the place where the voyage commenced, deducting the expense of carrying her there, and making a reasonable allowance for any deterioration she may have suffered up to the time when the loss happened.

ASSUMPSIT to recover freight *pro rata* for the transportation of the goods of the defendant in the vessel of the plaintiffs, and also to recover the defendant's proportion of a general average, arising from the voluntary stranding and subsequent loss of the vessel.

Upon the trial the point whether, where the ship is lost, the property saved is liable to contribution in general average, was reserved, and the presiding judge, Yeates, then charged the jury: 1. That where the voyage had been broken up by events beyond the control of the ship-owner or his agent, and the

agent of the shipper voluntarily receives the goods at an intermediate port, the law implies a new contract for the payment of freight *pro rata itineris*; and that where the agent of the shipper abroad is not desirous that the cargo should be carried to the port of original destination, it is not necessary that the captain should offer to ship the goods in other vessels for that purpose. And submitted whether Jesse Waln, the supercargo, had authority to receive the cargo at Algeiras, the place where the vessel was stranded and lost, and whether he did voluntarily receive it.

2. Assuming that the ship, though lost, was to be contributed for, that being the reserved point, the judge submitted the question whether there was such deliberation and voluntary act on the part of the captain, as constituted a case of general average; 3. He further charged that the value of the vessel was to be estimated according to what she was worth when she sailed from her port of departure, making a reasonable allowance for any deterioration she might have suffered by wear and tear up to the time when the loss took place.

The verdict being for the plaintiff, the defendant moved for a new trial: 1. Because, under the circumstances of the case, no freight was due; 2. Because the vessel was valued by an improper standard.

Binney and Chauncey, for the plaintiffs, on the reserved point, cited *Bynkershoek*, Quest. Jur. Priv. b. 4, ch. 24, tit. *de Jactu*, p. 424; *Voet*, Com. ad Paudect. b. 14, tit. 2, s. 8, p. 690; *Valin*, 168; 2 *Browne's Civ. and Adm. Law*, 199; 2 *Magens*, 200; *Whitlidge v. Norris*, 6 Mass. 131, *Case v. Reilly*, 3 Wash. 298; *Abbott*, 338; Rhodian law, *de Jactu*. Upon the right to freight *pro rata*, counsel cited *Evans v. Marlett*, 1 *Ld. Raym.* 271; *Lickbarrow v. Mason*, 6 *East*, 21-26; *Davidson v. Gwynne*, 12 *East*, 381; and as to the rule for ascertaining the value of the ship, they cited 1 *Emerigon*, 651; 2 *Valin*, 194, 195; 1 *Magens*, 58, 69, 72; 2 *Id.* 237.

Rawle, *contra*, upon the point reserved, cited *Emerigon*, 612; 2 *Huberus*, 429; *Cleirac*, 131, 132; 2 *Marsh.* 535, 536; *Molloy*, p. 3, sec. 4; *Beawes' Lex Merc.* 164; *Bradhurst v. Columbia Ins. Co.*, 9 *Johns.* 9. To show that *pro rata* freight was not recoverable, counsel cited *Armroyd v. Union Ins. Co.*, 3 *Binn.* 437; *Callender v. Ins. Co. of North America*, 5 *Id.* 525; *Schieffelin v. N. Y. Ins. Co.* 9 *Johns.* 21; and upon the rule of valuation cited: *Abbott*, 395, 396; *Parke*, 125, 127; 2 *Marsh.* 545; 1 *Ma-*

gens, 54, 58, 69; 11 Johns. 323; Code Napoleon de Commerce, b. 2, tit. 12, art. 417.

TILGHMAN, C. J. On the trial of this cause the judge reserved a point for consideration. Supposing the ship to have been voluntarily run on shore with a view of preserving as far as possible both ship and cargo, is it a case of general average? The defendant says it is not, because the ship was totally lost. But it is conceded that if the ship had been only damaged, the cargo, which was saved, would have been liable to contribution. If this be the law, it will be difficult to assign a reason for it, because the result is that for a small loss there shall be compensation, but a great loss is to go without compensation. The principle of general average is, that "what is given for the benefit of all, shall be made good by the contribution of all." This principle is recognized by the Rhodian law. It happens that the case put in that law is a jettison. But the reason for contribution is the same, whether the object sacrificed be ship or goods. The law of average is founded on policy and on equity. On policy, because there are men who would risk the loss of life and fortune rather than sacrifice their property without compensation. On equity, because nothing can be more reasonable than that the property saved should contribute to make good the loss which was the cause of safety. It is to be understood that this loss was incurred voluntarily, in time of imminent danger, with a view to the general good, because without these concurring circumstances there would be neither policy nor equity in contribution. It is to be understood, too, that the object in view, that is, the preservation of ship and cargo has been in whole or in part effected. If goods are thrown overboard to lighten the ship, notwithstanding which she is wrecked, neither the ship nor the goods which happen to be saved shall contribute, because they were not saved by means of the jettison. But if the jettison preserves the ship and cargo from the impending danger, and afterwards the ship is wrecked in consequence of a new peril, what is saved of the cargo shall contribute, because it would not have been saved but for the jettison. It appears to me that some confusion has taken place in the law respecting average, from not attending to the distinction between cases of jettison and running the ship on shore. In case of a jettison, the object in view is not attained unless the ship is saved; the goods which chance to be saved are not saved by means of the jettison. The reason for contribution, therefore, fails. But where the ship is run on shore, the object in

view, so far as concerns the cargo, may be completely obtained, though the ship be totally lost; because the goods are saved by means of the loss of the ship. There might be a case of jettison resembling the total sacrifice of a ship; that is to say, the jettison of the whole cargo. Such a case could rarely occur, and I believe never has occurred, but may be imagined, and if it should occur, I see no reason why the ship should not contribute. In time of imminent danger, general safety is the object, and ship and cargo are considered as one. Either may be sacrificed in part or in whole, and whether in part or in whole makes no difference so far as regards the equity of demanding contribution from that which is saved. I have given my opinion on this case upon principle. But it is necessary to consider it also upon authority; for of such importance is certainty in the law, that I should not think of setting up my own opinion against a series of unconflicting decisions.

Among foreign jurists, we have in favor of general average, Bynkershoek, Voet, Valin, Browne on the Laws of Admiralty, and the ordinance of Friesland, Antwerp and Konigsberg. On the opposite side are Emerigon and Huberus. At home we have the circuit court of the United States for this district, and Judge Story in his edition of Abbott, for the average; and the supreme court of New York against it. The cases were cited in the argument, and therefore I do not refer to them by book and page. Among foreigners the weight of authority appears to be in favor of average. Between the respectable judges of our own country, I make no comparison. Suffice it to say that the weight does not incline so decisively on either side as to prevent this court from following its own opinion. I feel myself free, therefore, to say that I agree with my brother Yeates, who directed the jury to consider this as a case of general average.

Besides the reserved point, the defendant's counsel have assigned two reasons for a new trial: 1. That no freight was due; 2. That the judge erred in law in his direction to the jury to estimate the ship according to her value at the commencement of the voyage, making allowance for wear and tear and any deterioration which might have taken place prior to her stranding.

1. As to freight, it is due *pro rata*, according to the principles laid down by this court in *Armroyd v. The Union Ins. Co.* 8 Binn. 437, and *Callender v. The Ins. Co. of North America*, 5 Id. 515; when the consent of the merchant, either by words or by actions, has been expressly given, or may be fairly inferred, to accept his goods at an intermediate port. In such case, the original

contract is dissolved, and a new one arises by implication. In the present instance, there was a supercargo on board to whom the goods were consigned, and to him they were delivered at Algeiras, a port not far distant from the port of delivery, and from which they might have been carried, and no doubt would have been carried to the port of delivery had the supercargo desired it, or had the captain supposed that the consequence of not carrying them there would have been the loss of the whole freight. It is material that the market at Algeiras was better than at Cadiz, so that the supercargo could have had no motive to desire that the goods should be carried to Cadiz. But it appears plainly by the evidence that had Cadiz been the better market they would have been carried there, because the supercargo went to Cadiz, compared the markets at the two places, and at one time seems to have had an intention to transport part of the cargo to Cadiz. There is no proof of an express offer on the part of the captain to carry the goods to Cadiz, or of an express agreement between the captain and supercargo that they should be delivered at Algeiras, paying freight *pro rata*. But considering the whole evidence, it is impossible to entertain a doubt that the cargo was voluntarily received by the supercargo at Algeiras, with knowledge that if he chose it, the captain would find means to transport it to Cadiz. It was suggested, but not much insisted on, that the supercargo had no right to receive the goods at any place short of the port of destination. Indeed, it ought not to have been insisted on, for surely in case of shipwreck the supercargo, from the nature of things, must have power to act for his principal. If he has not, who has, and what is to become of the cargo? Upon the whole, then, there can be no doubt that freight *pro rata* was due.

2. The jury, under the charge of the judge, estimated the ship at her value when she commenced her voyage, deducting one fifth for wear and tear, etc. To this the defendant objects, and says that the estimate should have been the price that the ship would have brought at Algeiras. In case of a jettison the rule is now fixed that the goods thrown overboard shall be valued at the price they would have been worth at the port of delivery. This is a just estimate, because it puts the owners of the lost goods upon the same footing with the owners of those which were saved, and it has the advantage of being easily reduced to practice; the price actually brought by the goods saved at the port of delivery serving as a standard for those which were lost. But the case is different when contribution is to be made for a

lost ship. We have no such standard there by which the value can be regulated. The object of contribution being to make good the actual loss, the rule to be adopted should be such as will most probably ascertain the actual loss. All agree in saying that the loss is the value of the ship at the moment preceding the loss. But what is that value, and how is it to be ascertained? The defendant contends that it is the sum the ship would have sold for at Algeiras or Gibraltar, and insists on the impropriety of valuing the goods by one rule and the ship by another. But the same reason does not hold for the valuation of the goods and the ship. The goods are intended to be sold at the port of destination, and being selected for that market, may be supposed in general to fetch a good price there. Not so the ship, which in many cases delivers her cargo and returns to the place where the voyage originated, her owners having had no intention to sell her at the port of delivery, which they may have known to be no market for ships. It would seem more just, therefore, to value the ship according to the price she would have borne at the place where the voyage commenced, deducting the expense of carrying her there. It is impossible to come at this exactly in any instance, and yet it is desirable to have a rule calculated to do justice in general. In cases where the ship has suffered no greater deterioration than the usual wear and tear of a voyage across the Atlantic, it has been supposed by some that a deduction of one fifth from her value at the time of commencing the voyage would do justice: *Leavenworth v. Delafield*, 1 Caines, 572 [2 Am. Dec. 201], cited in 2 Condry's Marshall, 545. This is the rule at New York, and the jury adopted it in the present case. I am the more inclined to be satisfied with it, as it is more equitable, more certain, and less liable to accidental fluctuation than the rule contended for by the defendant. Different nations entertain different ideas on the subject. France has thought proper to value the ship at the commencement of the voyage, striking off one half of the whole value and adding one half of the freight: 1 Emerigon, 651; 2 Valin, 194, art. 7; Id. 195. Hamburg fixes the value at the commencement of the voyage: 2 Magens, 237, art. 8. England takes the value of the ship at the end of the voyage, but whether this value is ascertained by the price at the port of destination does not clearly appear, although Parke, Marshall and Abbott seem to express themselves as if they so understood it: Parke, 127, 5th edit., & Marsh. 545; Abbott, 395, 396 (Story). It is to be observed, however, that cases like the present, where

contribution is to be made for a ship totally lost, seldom occur. In general, the valuation of ships is made for the purpose of ascertaining how much they shall contribute towards other losses. Finding no certain rule on the subject, and not perceiving that any which has been proposed is better calculated to do justice than that which was recommended by the judge who tried this cause, I agree with him in opinion, and am therefore against a new trial.

YEATES, J. A point was reserved on the trial of this cause, at the desire of the counsel on both sides: whether, if a ship be voluntarily stranded, and part of the cargo be saved, the vessel shall not be the subject of general average, although she be totally lost. The learned and laborious opinion of Judge Washington, in the circuit court of the United States for this district, delivered in May, 1814, between *Case v. Richards and Reilly*, has fully satisfied my mind upon this question.

I will not enter into a detail of the arguments he has made use of, or the authorities he has cited and answered in support of his legal conclusion, but shall content myself with observing, that his masterly system of reasoning contains the most just and correct inferences from the true principles of the Rhodian law, according to my apprehension, and conveys to my mind full conviction upon the subject in question. I have no hesitation, therefore, in declaring that the ship *Apollo*, under the events which have occurred, should be contributed for as general average. As to the reasons urged for a new trial, I see no ground for an alteration of the sentiments I gave in charge to the jury. I trust I never shall be so entirely wedded to any opinion as not willingly to retract it upon being satisfied that it was erroneous. Independently of the expressions of the defendant in his letter of instructions to Jesse Waln "to use his best endeavors to dispose of the goods consigned to him for the highest price that could be obtained for them;" of the terms of the bill of lading signed by Captain Bell, that "the goods were to be delivered to Jesse Waln, or his assigns, at Cadiz, the dangers of the sea being excepted," I conceive that the supercargo to whom the articles of merchandise were consigned, had the unquestionable right of determining for his constituents what ulterior measures should be pursued in cases of loss or detention, or other cases of necessity, superinduced by unforeseen events. The known representative of the shipper on board the vessel, in the absence of the principal, can alone decide on receiving or rejecting the goods at an intermediate port. The

master of such vessel would never think of asking the inspection of his employer's instructions in such an emergency. It is obvious, that it would be an idle ceremony to offer to carry the merchandise to the port of destination, where the shipper or his agent dispensed with it, either verbally, or by an unequivocal act on the part of the persons interested. Such acts would operate more powerfully in a controversy between the owners of ships and the proprietors of the shipments, respecting freight, *pro rata itinens*, where each party had their avowed agent at the intermediate port, than as between the insured and underwriters. It was submitted to the jury as a fact to be decided by them, whether the supercargo did not receive the goods of his own free will and accord at Algeiras; and from their verdict we are bound to presume, that he voluntarily accepted the goods at that port. This brings the case within the principle laid down by this court in *Armroyd v. Union Ins. Co.*, 3 Binn. 437; and in *Callender v. Ins. Co. of North America*, 5 Id. 525. It cannot be asserted that the verdict has not strong evidence to support it.

The market at Algeiras was preferable to that of Cadiz, but the jury were expressly told that, in no other view than to enable them to form a judgment of the grounds on which the supercargo probably proceeded, was the relative state of the markets material. The indorsement on the bill of lading, drawn up in the handwriting of Jesse Waln and signed by Captain Bell, that he had agreed to a deduction of forty cents per barrel upon the freight, in consequence of the cargo being landed at Algeiras, powerfully shows that he gave his full assent there to receive them. An agreement is the act of two minds at least. But with whom could he contract as to the ratable freight except with the supercargo? The letters of Jesse Waln to Gray and Taylor, his account of sales made by his order, remitting the net balance to Bainbridge and Brown, in London, and the account current which he drew up between the plaintiffs and defendant, wherein he charges the latter with £150 paid by him on account of the freight, are proofs that at the time of these several transactions he took it for granted that the new contract made for freight was binding on his constituent.

I told the jury on the trial that Jesse Waln had acted lawfully and prudently in making this contract. I went further, and submitted to them whether, if Mr. Robert Waln had been at Algeiras, a due attention to his own interests would not have led him to have pursued the same line of conduct which

his supercargo had done. It has been urged that the rule laid down to the jury, whereby the value of the Apollo was to be estimated, was incorrect. The ordinances of foreign nations furnish different rules on this subject, but all of them profess the principle that contribution should be a complete indemnity to the party whose property has been sacrificed for the common good. These regulations are arbitrary, but are considered as adapted to the state of commerce of each particular country. In France and many other of the continental states, contribution is made in some cases for the whole, in others for a moiety only, of the value of the ship and of the gross freight: Abbott, 345. In England a ship is valued at the sum she is worth at the time she sails on the voyage insured, including every expense of the outfit, to which is added the premium of insurance: 2 Marsh, 623. In New York the contribution is thus apportioned: on the cargo, valued at its first cost and charges at the port of departure; on the vessel, valued at four fifths of her actual value at the same place, exclusive of outfits, and on the freight, at one half the gross amount, payable in the event of a successful performance of the voyage: *Leavenworth v. Delafield*, 1 Caines, 373 [2 Am. Dec. 201].

Where it is said in Abbott, 345, that in England the owners contribute according to the value of the ship at the end of the voyage, and the clear amount of the freight after deducting the wages of the crew and other expenses of the voyage, I understand the author to mean the true value at the end of the voyage as contradistinguished from her real worth when the voyage commenced. I never can subscribe to the defendant's doctrine that the place where the voluntary stranding happened can form the principle of decision in the estimate. If it took place on a desert island, or at Otaheite, where no trade from foreign countries is carried on, such a rule would be pregnant with injustice. Nor should I deem Gibraltar a proper place under the circumstances of the present case, in order to determine the value of the Apollo there, because it was shown in evidence by Captain Edward Warrington that, although she would have commanded only between seven and eight thousand dollars in that port at market, she was in truth worth much more. It was a port of deep speculation where vessels were sacrificed when sold. I adhere to the principles I laid down on the trial, that she should be estimated at a fair price, such as she would have brought in an appropriate place where the American character of shipping was duly appreciated, in the

State wherein she floated immediately before she was run ashore. If her hull, sails, or rigging had been deteriorated by storms, or by wear and tear, she was not to be estimated at the sum she would have commanded when she sailed from the first port on her voyage. I still think this to be the only practical rule which can meet the real equity of such cases, that its correctness is warranted by 2 Magens, 58, and that the principle on which goods are valued which have been sent abroad for sale, differs essentially in the case of a carrying ship whose return to her original port may be fairly calculated in ordinary cases. The jurors had sufficient data on which they might form their estimate, and the value of the ship which they have found is satisfactory to my mind. I am of opinion that the motion for the new trial should be overruled.

BRACKENRIDGE, J., was absent from indisposition, but informed the chief justice that he concurred.

New trial refused, and judgment for the plaintiff.

Justice Story, delivering the opinion of the court in *Columbian Ins. Co. v. Ashley*, 13 Pet. 343, after referring to *Case v. Reilly*, 3 Wash. 298, and *Sims v. Gurney*, 4 Binn. 573, and the doctrine there held, that there was no difference between a partial and a total loss, occasioned by a voluntary stranding, both being equally cases of general average, proceeds: "And again, in *Gray v. Waln*, 2 Serg. & R. 229, upon a reargument of the whole matter, with all the subsequent lights which could be brought before it [the court], adhered to that opinion; and this has ever since been the established law of that court. We have examined the reasoning in these opinions, and are bound to say that it has our unqualified assent; and we follow without hesitation the doctrine, as well founded in authority and supported by principle, that a voluntary stranding of the ship, followed by a total loss of the ship, but with a saving of the cargo, constitute, when designed for the common safety, a clear case of general average."

The same question again arose in *Barnard v. Adams*, 10 How. 302, and the court citing the above cases, say: "There are few cases to be found in the books which have been more thoroughly, laboriously and ably investigated by the most learned counsel and eminent judges." And in the *Star of Hope*, 9 Wall. 232, Justice Clifford, delivering the opinion of the court, says: "To prevent any misconception as to the views of the court, it is deemed proper to add, that it is settled law in this court, that the case is one for general average, although the ship was totally lost, if the stranding was voluntary, and was designed for the common safety, and it appears that the act of stranding resulted in saving the cargo."

DEARTH v. WILLIAMSON.

[2 SERGEANT & RAWLIN, 498.]

COVENANT TO CONVEY.—A covenant to give a "lawful deed of conveyance," means a deed conveying a lawful or good title.

OFFER OF PERFORMANCE NOT EXCUSED.—Where, by articles of agreement for the sale of land, the plaintiff was to give a lawful deed of conveyance to the defendant, who was to pay a certain sum therefor, and procure a sheriff's deed of the property sold for unpaid taxes to be made to plaintiff, it was held that the plaintiff could not recover the consideration agreed to be paid, without making or offering to the defendant a deed of conveyance, although the latter had taken the sheriff's deed in his own name, and had never conveyed to the plaintiff.

ERROR to the court of common pleas. The action was for the recovery from the defendants, Williamson and others, administrators of Welsh, of three dollars and seventy-five cents per acre for a certain tract of land. It appeared that in June, 1809, George Dearth and Welsh entered into articles of agreement, by which G. Dearth promised for himself and his heirs to make a lawful deed of conveyance, at the expiration of four years, of the tract in question to Welsh, who agreed to pay therefor. It was also stipulated that Welsh should procure a commissioner's deed to be made to G. Dearth for the tract, the same having been sold at sheriff's sale for unpaid taxes, assessed in the name of Randolph Dearth, and having been purchased by Welsh for G. Dearth. The sheriff's deed, commonly known as a commissioner's deed, was executed in Welsh's name, and he never procured to be made, or made, a conveyance to the plaintiff of the title derived from the commissioners. It did not appear that the plaintiff made, or offered to make, any conveyance to Welsh after the date of the articles. The court charged the jury in favor of the defendant, to which the plaintiff excepted.

S. B. Foster and Campbell, for the plaintiff in error, contended that the plaintiff had been discharged from performance, as it was impossible for him to give a legal title to Welsh, he not having procured the sheriff's deed to be made in plaintiff's name. The act of the person to be benefited was the cause of the non-performance: 1 Pow. Cont. 417.

Ayres, contra.

TILGHMAN, C. J. (After stating the case.) If nothing else was intended by the articles of agreement, than that the plaintiff should reconvey to Welsh the title derived from the commis-

sioners, which Welsh was first to procure to be vested in him, then indeed there can be no objection to the plaintiff's recovery in this suit, because Welsh has the title from the commissioners vested in him already, and it was impossible for the plaintiff to convey what, through Welsh's default, he never had. The law is clear, that if a man by his own act, prevents me from doing what I covenanted to do in his favor, he thereby discharges me from the covenant. But this is not the meaning of the articles. The plaintiff was to make a lawful deed of conveyance, that is, he was to convey a lawful title, for which he was to receive the full value of the land. It does not appear that the plaintiff had any title whatever, but from his taking letters of administration on the estate of Randolph Dearth, in whose name the land was assessed when it was sold for taxes, it would seem as if he was endeavoring to derive some title under him. Sales for taxes have been seldom so conducted as to give a good title to the purchaser. It would therefore require clear expressions in the articles of agreement to induce the conclusion that three dollars and seventy-five cents an acre was meant to be given for no more than the title under the sale for taxes. But the expressions are by no means clear to that purpose. On the contrary, a lawful deed of conveyance may be fairly understood a deed conveying a lawful or a good title.

But it has been urged by the plaintiff, that supposing this to be the construction of the articles, it was the business of the defendants to prepare the deed and tender it to the plaintiff for execution. If the plaintiff had told the defendants that he could show a good title, which he was ready to convey, if they would have a deed prepared, we might then enter into the consideration whether the plaintiff or defendants was bound to have the deed drawn. But the plaintiff, having covenanted to make a lawful deed, was at least bound to produce his title to the defendants, and offer himself ready to execute a deed. For without a sight of the papers, it would not be possible for the defendants either to prepare a deed or form a judgment of the goodness of the title, which they had a right to be satisfied of before they paid the purchase-money.

The court of common pleas were not in an error, therefore, when they directed the jury "that some other interest than that derived from the commissioners was to be conveyed by the plaintiff, and that a conveyance ought to have been made and tendered. or at least offered to have been made, before he could

be entitled to recover in this suit." I am of opinion that the judgment should be affirmed.

YEATES, J., was sick and absent.

GIBSON, J.,* concurred.

See the construction given in this case to a covenant to give a lawful deed, followed in *Wilson v. Getty*, 57 Pa. St. 270.

McWILLIAMS v. NISLY.

[2 SERGEANT & RAWLE, 507.]

SUBSEQUENTLY ACQUIRED TITLE.—Where one sells and conveys lands to which he has no title, but afterwards acquires title, his heirs will be estopped to deny the title in the grantee.

IDEM.—Where land is conveyed with certain restrictions on the power of alienation, and the grantee aliens in violation thereof, but by subsequent events, such restrictions are at end, his heirs are estopped from contesting the validity of the conveyance.

ERROR to the common pleas. Ejectment. The case came before this court upon the facts appearing in evidence on the trial below, which facts were agreed to be considered as found by a special verdict. The case appears from the opinion. Judgment for the defendants Nisly and others.

Chambers and Duncan, for the plaintiffs in error.

Watts, Brown and Riddle, contra.

TILGHMAN, C. J. This case depends upon the construction of a deed from William Gass and wife to James McWilliams, deceased, father of the plaintiffs. Gass was grandfather of the plaintiffs, being the father of their mother, Mary, the wife of the said James McWilliams, who was his only child. The deed being in consideration, as well of the natural love and affection which the grantors bore to their son-in-law, as of five shillings lawful money, may well operate as a deed of bargain and sale, by which the legal estate in fee-simple may be vested in the grantees. But although a fee-simple was conveyed, yet it was subject to certain restrictions, as to the power of alienation; that is to say, the said McWilliams was not to sell the estate in the life-time of the said Gass, unless Gass sold the land on which he himself then lived; but if McWilliams should die, living Gass, and before Gass had sold the land on which he

* John B. Gibson was appointed June 27, 1816, to the vacancy occasioned by the death of Judge Brackenridge, who died June 26, 1816.

lived, in such case he was to leave the estate to his wife Mary, the daughter of Gass, or to the lawful issue of her body. On the contrary, if Gass should sell the land on which he lived, during the life of McWilliams, or if he should die, and McWilliams survive him, in either of those cases, McWilliams was to have "free liberty to bequeath or sell and convey the estate, as he chose." It turned out that Gass sold about a hundred and sixty-eight acres (out of about four hundred and forty-four acres) of the land upon which he lived, during the life of McWilliams, but retained his dwelling-house and the remainder of his land, after which McWilliams, during the life of Gass, sold to the defendants, or those under whom they claim, the whole of the estate conveyed to him by Gass, amounting to about one hundred and fifty acres. Afterwards Gass died, and McWilliams survived him. It cannot be denied that the wife and children of McWilliams took some contingent interest by the deed of Gass, although what it was is not clearly defined; the expression being that on a certain event McWilliams was to leave the land to his wife or her lawful issue.

Much research and ingenuity have been exerted by the plaintiff's counsel, in showing the different manners in which the interest of the wife and children might be secured to them by operation of law, on this deed. In conveyances to uses, where the legal estate is transferred to the use, by virtue of the statute of uses, a grantor may do many things which it would be difficult to effect by common law conveyance, and the courts will do every thing in their power to support the intent of the grantor, even by making the deed operate as a kind of conveyance which was not intended. The estate intended to be conveyed being the main thing, and the conveyance only the instrument by which the transfer is effected. It is necessary that some person should be seised of the legal estate in fee, and then the uses being declared, the legal estate passes over, and becomes united to the use, so that the *cestui que use* is vested with the legal estate. These uses need not all take effect at the moment of making the deed, but may spring up from time to time, upon such contingencies as are thought proper, provided always, that nothing in the nature of perpetuity can be established. In the present case, the legal estate being conveyed to James McWilliams, who accepted it on the terms mentioned in the deed, such acceptance may be construed as a covenant by him, to stand seised, to such uses as appear to be intended in favor of his wife and children. We must inquire, then, what was intended in

favor of the wife and children, whether such intent was lawful, and whether the events have happened on which their interest was to arise. It was intended in the first place, that James McWilliams should not sell, during the life of Gass, unless Gass had previously sold his own land.

The defendants contend, that this restriction was unlawful, being incompatible with the nature of an estate in fee-simple, and that even if it were lawful, it was removed by the sale of part of Gass's land. Where an estate is given, and afterwards a restriction imposed, destructive of that estate, the restriction is void. Therefore, if after giving a fee a general and perpetual restriction of alienation were added, the restriction would be void. But if the restriction is partial, such as aliening to a particular person, it would be good, because this is not inconsistent with a reasonable enjoyment of the fee. So, I take it, if the restriction was of alienation during a particular time, as is proved by the decision in *Largis's case*, 1 Leon. 82, which has been cited and recognized in the books of abridgment and elementary authors of good authority down to the present day, and I have no doubt is law. For what length of time this general restriction may endure, it is not necessary to decide, nor shall I attempt to trace the boundary. Suffice it to say, and I think it may be said with great safety, that it may last during the life of any person in existence at the time of making the deed. That is enough for the present purpose, for there is no restraint in this deed beyond the life of James McWilliams. Whether the restriction ceased as soon as Gass sold part of his land, is a point not void of difficulty. But I shall give no opinion on it, as the case may be decided on clearer and better ground.

Let us go on then to investigate the extent of the deed. The only case in which any provision was intended in favor of McWilliams' wife and children, was, that of his dying in the life of Gass, and before Gass had sold his own land. But the instant Gass sold, or died, all idea of provision vanished, and the estate of McWilliams was to be absolute and uncontrolled. This is the clear intent of the deed. So that under the events that have taken place, if the wife or children of McWilliams retained any interest, it was contrary to their grandfather's design.

This is so manifest that the plaintiff's counsel were reduced to difficulties in the argument. After producing many authorities to show that in deeds operating by way of use, the court would strain to support the intent of the grantor, they were reduced to the necessity of turning short about and construing

this deed, so far as respected McWilliams' interest, with the severity of a common law conveyance. Sometimes they supposed that there was a condition subsequent, which forfeited the estate of McWilliams as soon as he executed a conveyance of any part of his estate. They then were for tying him down to the rigid execution of a power, assuming that he had nothing more than a power to sell on certain contingencies which had not happened. But there is nothing like a condition in this case, because an entry for a condition broken would have defeated the interest of the wife and children, which it was the object of the restriction to protect. There is more reason in saying that there was a conditional limitation. But that would not answer the plaintiff's purpose, because the limitation would not take effect, McWilliams having survived Glass, and there being nothing in the deed which shows an intent, in any event, to deprive McWilliams of the estate and give it to his wife and children during his own life. Finally the objection to the defendant's title is reduced to this, that at the time of the execution of McWilliams' deeds he had no power to sell. This is true, and if under the events which have taken place any use could arise to the plaintiffs under their grandfather's deed, they ought certainly to recover. But as there is no such use, their title now must be derived from and under their father, James McWilliams, as his heirs, and not paramount to him.

The case then will stand thus: James McWilliams sells and conveys land to which he has no title, but afterwards acquires title. Can his heirs recover against his grantees? It appears to me that in such case they would be estopped by their father's deed from denying his title, and if there were occasion for further assurance, equity would compel them to make it. If the interest of James McWilliams had extended no farther than a power to sell on certain conditions, with an interest limited to his children in case he did not execute the power, then indeed a non-execution, or even a defective execution, would not be aided, because the children having as much equity as the purchasers under their father, the court would not interfere. But I consider the father, after the death of the grandfather, as enjoying an unlimited estate, to which the doctrine of powers would not be applicable. It is objected that a person who makes a voidable deed (as an infant) cannot be compelled to confirm it afterwards, although he has absolute power over the estate. But these cases are very distinguishable. The deed of an infant is voidable because the law supposes him to be of

insufficient understanding to make the contract, and this presumption cannot be contradicted. It remains, therefore, in as full force when the infant arrives at age as ever. The fact still is, that the deed was made by a person of insufficient understanding, and therefore there is no ground for insisting on a confirmation of it. But in the case before us there was no personal incapacity, nor any reason why the conveyances of McWilliams were not good except that they were contrary to the provisions which the deed of William Gass contained for the wife and children of McWilliams. But now that events have happened which have defeated that intended provision, and according to the intent of William Gass all restraint on McWilliams was to be removed, it can make no difference as to Gass's intent whether the conveyances of McWilliams were executed at one time or another.

Suppose that McWilliams, instead of conveying, had entered into articles, reciting the title under which he held, and covenanting to convey, in case subsequent events should make it lawful, there can be no doubt but that when the course of events had removed the restrictions, he would be decreed to convey. And I do not think the case less strong, because instead of entering into articles he made an absolute conveyance. A case has been cited of a tenant in-tail, who covenanted to suffer a common recovery for a valuable consideration. A bill in equity was filed on this covenant, he was decreed to suffer a recovery, and committed for contempt in not performing the decree, and died in imprisonment. The heir in-tail took the land. The reason is plain, because the heir in-tail claimed *per formam doni*, paramount the father who died in imprisonment. And the law would be the same if in the present case the wife or children of McWilliams had any interest in this land after their grandfather's death. This is the turning point of the cause. It appears clearly to me, that they had no interest, and therefore McWilliams would have been decreed to execute a conveyance if a bill had been filed against him after the death of Gass. My opinion is, that the judgment should be affirmed.

YEATES, J., was sick and absent.

GIBSON, J. The plaintiffs must recover, if at all, either as heirs of William Gass, or as purchasers under the deed of the ninth May, 1775, or as the heirs of James McWilliams. The intention of Gass, at the time the deed was executed, seems to have been, that as long as he remained the owner of the mansion

part of what originally formed the whole estate, no part of it should go out of the family. He also seems to have resolved not to sell; so that the whole of his property, or what remained unsold, in case he changed his intention in part, should be reunited in the family of McWilliams, and that in case McWilliams died before him, a provision should at all events be secured to his wife and children. There was also a secondary and subservient intention to provide for McWilliams and his wife, during his own life, or until he should make a different disposition of his whole property inconsistent with the above arrangement, in which case McWilliams was to be the owner of the part granted him absolutely. These objects, he appears manifestly from the provisions of this deed, to have had in view. I therefore do not think the plaintiffs can claim a right of entry as the right heirs of Gass for a condition broken. For to construe the restriction against alienation as a condition, the breach of which would work a forfeiture, would frustrate one of the essential objects of the grantor, to wit, to secure a provision for the plaintiffs themselves. It is unnecessary to consider whether as a condition, this restriction would be totally void as being against the policy of the common law, as it is very clear that if the intention of the grantor cannot take effect under this instrument as a conveyance at common law, it may as a conveyance to uses. McWilliams stood seised under this deed to his own use in fee, with a springing use to his wife in case she survived him, and if not, to her issue, limited to take effect on the contingency of McWilliams dying in the life-time of Gass, not having then sold the land he lived on at the execution of the deed. McWilliams survived Gass. I therefore take it the contingency never happened within the intent and meaning of the deed, on which the use to the plaintiffs was to arise.

I do not consider this as a conditional limitation of an use to the plaintiffs taking effect as soon as McWilliams should do any act inconsistent with the nature of the estate granted to him; and if it were so, I do not consider the conveyances to the defendants as acts tending to defeat the interest of the plaintiffs. For, claiming under the deed, and being of course purchasers with notice, they would stand seised to the same uses whenever they should arise, that he did. The estate could not go over to the plaintiffs at the time, for they could not, at all events, take in the life-time of their father. I take it, then, the plaintiffs cannot claim as purchasers under the deed, the contingency not having happened, upon which the use was to have shifted. If

they recover, it must be as the heirs at law of McWilliams. At the time of the execution of the conveyances to the defendants, he had no power to execute any deed. Therefore the cases cited by the plaintiffs' counsel, respecting a defective or non-execution of a power, which always suppose the existence of one at the time, do not apply. It is clear, also, that McWilliams, by surviving Gass, when all restrictions became extinct, did not thereby acquire a naked power to sell, unconnected with his interest in the land. He became the absolute owner of the fee-simple. It is by considering his conveyances in the light of an execution of a power defective and void, that any difficulty is raised in the mind. Suppose that instead of conveyances executed, he had entered into articles with the defendants, to convey to them as soon as he should become the absolute owner of the land, there cannot be a doubt but that chancery would decree a specific performance of the contract. So in equity, a grantor conveying land for which he has no title at the time, shall be considered a trustee for the grantee, in case at any time afterwards he should acquire title. Then shall not McWilliams, or the plaintiffs in his stead, be so considered, they having no title under the deed from Gass but what they take, as heirs of McWilliams; and that being the case, chancery would compel them to convey to the defendants. The judgment being in favor of the defendants, must be affirmed. Judgment affirmed.

WALLACE v. DUFFIELD.

[2 SERGEANT & RAWLS, 521.]

PABOL EVIDENCE OF RESULTING TRUST.—Where executors were authorised by will to sell land devised to the testator's family on giving security, and they sold the land and employed the money it produced in the purchase of other lands, these circumstances, together with evidence of the declarations of one of the executors, will be sufficient to raise a trust for the family in the lands thus purchased.

LAPSE OF TIME AFFECTING TRUSTS.—Although trusts are not strictly within the statute of limitations, yet equity has adopted the principles of that act.

ERROR to the common pleas in an action of ejectment brought by William Duffield and Rebecca, his wife, against Joseph and Margaret Wallace. Verdict for the plaintiffs below. The case appears from the opinion.

Riddle and Duncan, for the plaintiffs in error, cited *Lane v.*

Dighton, Amb. 409; *Oox v. Baitman*, 2 Ves. 19; *Ryall v. Ryall*, 1 Atk. 59; *Deg v. Deg*, 2 P. Wms. 412; 1 W. Bl. 123; *Gregory v. Saller*, 1 Dall. 193; *German v. Gabbald*, 3 Binn. 302 [5 Am. Dec. 372]; *Loyd v. Spillet*, 2 Atk. 450; 2 P. Wms. 145; 3 Id. 143; 3 Atk. 225, 538; 2 Vern. 167; 1 Atk. 59; 2 Fonb. Eq. 120; Prec. in Ch. 84, 103, 168, 172; 1 Cruise, 472; Sugden on Vendors, 242; *Smith v. Clay*, Amb. 645; 1 Atk. 474.

McCullough and Watts, contra.

TILGHMAN, C. J. No facts appear but such as are mentioned in the charge of the court, so that the only question is, whether there be error in law in the opinion delivered on those facts. Josiah Wallace deceased by his will, dated twenty-sixth April, 1775, appointed his wife, Ann, and his son, William, his executors, and authorized them to sell the plantation on which he lived, in Chester county. If they chose to live on it, and keep the family together, they were permitted to do so; but, in case the land should be sold, they were to give security to the testamentary guardian of the testator's other children, if required, for the shares devised to them by the will. The testator died in the year 1778. In April, 1779, the executors sold the land for two thousand pounds, continental currency, and took a deed in their own names. The money received for the testator's land was kept by itself, and eighteen hundred pounds of it were applied to the payment of the purchase-money of the Franklin county estate. Whether two hundred pounds more of the testator's personal estate was not also applied in the same way, was a fact which appeared doubtful, and was left to the jury. There was evidence of declarations by William Wallace, tending to show that the purchase in Franklin county was in trust for the testator's family. These declarations were also left to the jury, with directions to find for the plaintiffs, Duffield and wife, who claimed on the supposition that the land in dispute was purchased in trust for the family, in case they should be satisfied from the declarations of the executors, and other circumstances, that the land was really intended to be purchased in trust. That the jury were satisfied of these facts must now be taken for granted, as they found for the plaintiffs. Resulting trusts are not within the provisions of the act of assembly, which requires conveyances of land to be in writing.

Where money is paid by A. and a conveyance of the land taken in the name of B., a trust arises for B. But it is objected that the law of resulting trusts does not apply to the

case before us, for two reasons: 1. Because the eighteen hundred pounds applied to the purchase was not the money of the legatees. The executors had a right to use that money as they pleased, and could only be called on to pay the several legacies at the time appointed by the testator; 2. Because the land in Franklin county cost four thousand pounds, which was double the amount received for the testator's land in Chester county. These objections would have great weight if the cause rested solely on the application of the proceeds of the Chester county estate in part payment for the land purchased in Franklin county. But the plaintiff's case is very much strengthened by the declarations of the executors. The bare investment of the testator's money, together with money the private property of the executors in a purchase of land, might not afford convincing proof that there was an intent to purchase in trust for the legatees, and therefore a trust might not result by operation in law. But when to the investment of the money is added the declaration of the purchaser, that a trust was intended, a trust must certainly be raised, and the only difficulty is in the proof of these declarations by parol evidence. As to that the cases of *Gregory v. Saller*, 1 Dall. 193, and *German v. Gabbald*, 3 Binn. 302 [5 Am. Dec. 372], are strong in favor of the evidence. The charge of the president of the court of common pleas was delivered in very cautious and guarded language. The jury were warned of the danger of listening to parol evidence, unless it was clear and convincing, and they were told that the law would not raise a trust, unless an intention to create it was proved by parol or other declarations. Supposing the intent to be proved, no difficulty would arise from the circumstance of only part of the purchase-money being paid from the funds of the testator. The amount of the whole purchase-money, and of that part which was taken from the funds in the hands of the executors, being ascertained, it was easy to calculate the proportion of the land on which the trust would operate, and in that respect the jury received precise and proper instructions from the court. I do not see, therefore, that there is any error in the charge so far as respects the trust.

Another exception is made to that part of the charge which relates to the act of limitations. It was left to the jury to decide, from all circumstances, whether from the length of time between the purchase of the land in dispute, and the bringing of this ejectment, it might not reasonably be inferred that the plaintiffs considered the estate as belonging to the de-

pendants. It is contended that the act of limitations is a positive bar. But there are no facts on the record to warrant us in saying so. It does indeed appear that there was an interval of thirty-one years between the purchase of the land and the commencement of this suit. But it does not appear in what manner the possession has gone. The judge refers to circumstances respecting the situation of the family, which were given in evidence but are not on the record. We may imagine many circumstances which would rebut the presumption arising from length of time. Trusts are not strictly within the act of limitations; but equity has wisely adopted the principle of the act. Nevertheless, in equity, as well as at law, it may be shown from circumstances that the possession of the defendant ought not to be considered adverse. Not knowing what were the circumstances alluded to in the charge, we cannot judge of the weight of them. Neither can we say that there was error in referring them to the consideration of the jury. It was in the power of the defendant's counsel to have had all material facts placed on the record. But having brought up the charge of the court without any other facts than what are mentioned in it, we can only judge of it as we find it. Not perceiving any error, I am of opinion that the judgment should be affirmed.

YEATES, J. We must judge of this case from the facts disclosed in the charge. The jury were instructed that at least one thousand eight hundred pounds of the consideration money paid for the lands in question, was identified to be the same money as had been received on the sale of the lands in Chester county, and that no evidence had been given of the widow or son having any property but what arose from the testator's estate; that William Wallace, the acting contracting party had declared that if the money had not been so invested the girls might have gone and whistled for their fortunes, and that the money would have all perished. And the question of fact was submitted to the jury, whether an express trust was not proved to their satisfaction, and manifested by all the circumstances of the case. The jury were told explicitly that some intention must appear by parol or other declarations, so as to raise the trust, or it might be derived by necessary implication from the nature of the acts proved. I can see nothing incorrect herein, nor in assimilating the case to *German v. Gabbald*, 3 Binn. 302 [5 Am. Dec. 372]. Let us transport ourselves back to the period of time when the different transactions took place. The circulating medium of the country was fluctuating, and though different persons as-

cribed depreciation to different causes, all agreed that it was sinking in value in 1779. It can excite no surprise that the widow and eldest son of the testator should be anxious to invest the proceeds of the Chester county property in lands here; and acting as executors, should take the conveyance in their own names. They were bound by every tie of duty to take the best measures to promote the best interests of the family. The verdict of the jury concludes us on this point by establishing the trusts on the facts fairly submitted to their decision.

The jurors were truly told that the trust estates are not within the act of limitations, but that presumptions of acquiescence might be raised from the lapse of thirty-one years, which might give just ground to infer an abandonment of the claim of the plaintiffs below, but that nevertheless such presumptions might be repelled by all the facts and circumstances which had been shown in proof in the course of the cause. No one can deny that this is sound legal reasoning. A presumption will only stand until the contrary be proved. We are left in the dark as to those repelling facts and circumstances. We know nothing of the possession of the land, whether it was friendly or adverse to the claim of Duffield and his wife. But we are bound to conclude that the jurors did not form their opinions without just grounds. No motion was made for a new trial, nor could we go into that inquiry if it had been made. Judgment was rendered on the verdict, and I think it should be affirmed.

GIBSON, J. This case differs in an important feature from *Gregory v. Satter*, 1 Dall. 193, and *German v. Gabbald*, 3 Binn. 302 [5 Am. Dec. 372], which carried the doctrine of resulting trusts quite far enough. In each of the two last, the whole consideration moved from the person to whom the trust was held to result. In this, more than a moiety of the purchase-money was paid by the executors with their own funds. A resulting trust, properly so called, arises where the purchaser of land pays the purchase-money, but takes the conveyance in another person's name. But where a trustee purchases with the trust fund, and takes the conveyance in his own name, there is properly speaking no resulting trust, though it is usually called so; for there is in equity a very substantial difference between them both in the quality and extent of the relief that can be called for. In the former, the trustee will be compelled to execute the trust by a conveyance of the land, in the latter chancery will raise the money out of the land, by a sale of the

whole, or such part of it as may be necessary to produce the sum withdrawn from the trust, and this mode is peculiarly convenient where only a part of the consideration has been taken from the trust fund. In *Kirk v. Webb*, Prec. in Ch. 84, and *Halcott v. Markant*, Prec. in Ch. 168, it was said money has no earmark, and that chancery cannot, therefore, follow it into the land where it has been invested. But it is certainly law that it may be pursued where the purchaser stood as a trustee in relation to the fund. This was decided in *Deg v. Deg*, 2 P. Wms. 414, and in one or two British cases since the revolution, in which it was held the owner of the trust fund had a specific lien. In Pennsylvania, where we cannot, for want of a court of chancery, decree a sale, we are compelled to have recourse to the action of ejectment as a means and instrument of doing equity between the parties, although the object is for the most part attained by it in an imperfect manner. On the whole evidence, then, it would seem, the plaintiff below might recover, and that the direction of the judge was substantially right. As to the other point, I concur without hesitation.

Judgment affirmed.

As to trusts established by parol, see this case approved in *Hale v. Harris*, 2 Watts, 146; *Lloyd v. Carter*, 17 Pa. St. 220; and *Morey v. Harriek*, 18 Pa. St. 129; see, also, note to *German v. Gabbald*, 5 Am. Dec. 372.

TAYLOR v. ADAMS.

[2 SERGEANT & RAWLE, 534.]

GRANTOR'S DECLARATIONS AS EVIDENCE.—Where executors were empowered by a will to sell certain lands, and one of them entered into articles of agreement with the plaintiff to sell the lands to him, evidence of the declarations of the acting executors, prior and subsequent to plaintiff's entry under the articles, is admissible to establish the title in him.

GRANTEE'S DECLARATIONS NOT EVIDENCE.—The declarations of the grantee at the time of taking possession, are not admissible in his own favor.

ERROR to the common pleas. Ejectment. Taylor, the plaintiff below, claimed under George Woods, in whom title was shown. Woods made his will, appointing McDowell, Anderson and Woods his executors, with power to them, or the survivors of them, to sell his lands. McDowell renounced the office of executor. It appeared that Taylor entered into written articles of agreement with Anderson for the purchase of the tract in

question, paid the price asked, and cleared a portion of the premises which were adjoining plaintiff's land. Plaintiff offered to prove, by Anderson and Woods, that prior to the articles of agreement, Woods had consented to the sale; and that subsequent thereto, and before the commencement of the suit, Woods had confirmed the articles, and together with Anderson, directed plaintiff to take possession, pursuant to the agreement. Plaintiff offered to prove, also, that the testator had, in his life-time, agreed by parol to sell the land to him upon the same terms on which he purchased of the executors. This evidence was rejected, as was also evidence offered by the plaintiff of the declarations made by him when he entered into possession, as to his having purchased the land. The court sealed a bill of exceptions.

S. Biddle, for the plaintiff in error.

Huston, contra.

TILGHMAN, C. J. The power to sell being to all the executors, could not be executed by one. The plaintiff, therefore, could derive no title from the articles of agreement, considered by themselves; but connecting them with the other circumstances which he offered to prove, he would at least be entitled to the possession of the land, which would be sufficient for a recovery in this suit. The evidence rejected, in conjunction with that which had been given, would prove that both the executors had consented to the agreement, one by writing, the other by parol. Now, this would certainly be as good as a parol agreement by both. Supposing then a parol agreement by both, with payment of the whole purchase-money and permission to take possession, there can be no doubt, but under repeated decisions of this court, the purchaser would be entitled to recover in an ejectment. Although the act of frauds declares that no title shall pass greater than an estate at will without a contract in writing, yet on a bill in equity filed against the vendors, if they confessed the agreement, they would be decreed to execute a conveyance. The present case is stronger. The vendors not only confess the contract, but the receipt of the whole purchase-money. The counsel for the defendants confess that this would be title sufficient to recover against the vendors. But they take a distinction in favor of the defendants, who claim adversely to the vendors, for which I can perceive no reason. The defendant stands upon his own possession. What right then has he to say that there is a defect in the conveyance from the

executors of Woods to the plaintiff, when the executors say no such thing, but declare their consent that the plaintiff should take possession of all the land which they had a right to sell? Upon the strict words of the act of frauds an estate at will would pass, under which the plaintiff would be entitled to the possession against the defendant. I am therefore of opinion that the evidence should have been received. There was other evidence offered by the plaintiff, and properly rejected by the court. I mean the evidence of the plaintiff's own declarations respecting the purchase of this land, and his having taken possession of it. Upon the whole, I am of opinion that the judgment should be reversed, and a *venire facias de novo* awarded.

YEATES, J. The declarations of the plaintiff in error, as to his having taken possession of the lands in controversy, or of his having purchased them, could not possibly be received in evidence. Nothing can be more clear than that a person shall not be permitted to make testimony for himself, in his own cause. But I cannot see the propriety of overruling the testimony offered to show that Henry Woods agreed to the articles made by Dr. John Anderson, his co-executor, on the fifteenth December, 1809, previous to the execution thereof, and confirmed the sale of the land to Taylor; and further, to prove that George Woods, the testator, in his life-time, had agreed with the said Taylor, by parol, for the same lands, on the terms mentioned in the said articles of agreement, although no money was paid to the said testator, nor possession was then delivered. It is admitted, that the said testator authorized his executors to sell his real estate by the terms of his will. A distinction has been attempted to be made by the defendant's counsel, that such testimony would be admissible against persons claiming under the testator, but not against strangers holding under an adverse title. No sound reason can be given for this distinction.

It has often been decided that a parol contract for the sale of lands in part executed, will take a case out of our act of frauds and perjuries, passed March 21, 1772. Here the full consideration-money was paid, and a receipt indorsed on the agreement, which was fully assented to by the other executor, conformably to the terms agreed to verbally by the testator in his life-time. There can be no doubt that a court of equity would decree the specific performance of these articles of agreement, and it necessarily follows, that according to our uniform usage, the vendee must be considered as having such an equitable interest as would

support an ejectment. If the sale would be available against the *haeres factus aut natus*, it surely would operate against strangers not claiming under the testator, who would be put to impeach the title on other grounds.

I am, therefore, of opinion that the evidence offered was improperly rejected, that the judgment below be reversed and a new trial awarded.

GIBSON, J., concurred.

Judgment reversed and a *venire facias de novo* awarded.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

SINGSTACK v. HARDING.

[4 HARRIS & JOHNSON, 126.]

ENTRY IN AUCTIONEER'S BOOK.—An auctioneer is agent for the bidder at an auction as well as for the owner of the property, and an entry by him in the auction book, of the name of the bidder, and the amount bid, is a sufficient memorandum in writing to take the case out of the statute, whether the sale be of real or personal property.

PURCHASE BY TRUSTEE.—A trustee cannot be a purchaser at his own sale.

APPEAL from the county court. The appellants, the executors of Singstack, brought an action on the case to recover the difference between the amount bid by the defendant for certain real estate at public auction, and the amount bid at a resale of the same property, the defendant having refused to comply with the terms of the first sale. It appeared that the first sale was made pursuant to the will of plaintiff's testator, and that the property was struck off to defendant, the highest bidder. At the time of the sale, the auctioneer's clerk entered defendant's name in the auction book as the purchaser, together with the sum bid. Defendant saw the clerk with the auction book. Defendant entered upon the premises and occupied the same for several weeks, when he refused to pay the installment and give his bonds for the unpaid residue, as called for by the advertised terms of sale, and told plaintiffs that he would not keep the house. Plaintiffs then published weekly for four weeks notice of a resale of the premises, at which sale the premises were struck off to one Tarlton for a sum much less than that bid by the defendant at the original sale. It appeared that the second purchase was made by Tarlton for the use and benefit of one of the executors, plaintiffs herein.

Verdict and judgment for the defendant.

Taney, for the appellants, urged that the sales were valid within the statute of frauds, and that the objection that the property was purchased by one of the plaintiffs at the second sale, could only be taken advantage of by the heirs.

Shaaff, contra, contended that the second sale was fraudulent: 2 Fonb. 159; and therefore no sale.

By Court, NICHOLSON, J. The court are of opinion in this case, that the original sale to the appellee of the house and lot was a good sale, the auctioneer being the agent of both parties, having entered the appellee's name in the auction book as the purchaser. The uniform current of the decisions has been that such an entry was a sufficient memorandum in writing of the contract in the sale of chattels to gratify the requisitions of the statute of frauds; and that statute makes no distinction between a memorandum in writing for the sale of chattels and the sale of lands.

But the court are of opinion that the pretended sale to Tarlton, being for the benefit of one of the executors, was no sale, and that therefore the appellee was not liable for the difference in the price arising from that supposed sale and the original sales to him.

Judgment affirmed.

BARNEY v. PRENTISS.

[4 HARRIS & JOHNSON, 317.]

NOTICE LIMITING CARRIER'S RESPONSIBILITY.—Carriers of goods and merchandise for hire are responsible for loss of articles delivered to them to be carried, but if they can by advertisement exonerate themselves from responsibility, in certain cases, the language of the publication should be plain, explicit and free from all ambiguity.

APPEAL from the county court. The case appears from the opinion.

Winder and Murray, for the appellant, cited *Jones on Bailment*, 102, 106; *Laws of Carriers*, 11, 25; *Titchburne v. White*, 1 Str. 145; *Clark v. Gray*, 4 Esp. 177.

No counsel appeared for the appellees.

By Court, JOHNSON, J. This is an action on the case brought by Prentiss and Carter against Barney, to recover the value of a parcel of goods placed by them in the possession of the defendant, to be carried for hire from Baltimore to Philadelphia.

The cause was determined on a case stated in favor of the plaintiffs, from which determination the defendant appealed.

The case stated sets forth, that the plaintiffs, the proprietors of a case of senshaws of the value of six hundred and twenty-seven dollars, delivered them at the stage-office, and had them entered on the way bill for transportation, and for which they were to pay a reasonable compensation; that a letter from the plaintiffs to their correspondent in Philadelphia was at the same time put into the post-office, which was in due time received. But the goods from the case stated do not appear to have been received at Philadelphia, nor any account given of them. It, also, appears that the defendant was, at the time the goods were delivered, the owner and proprietor of a line of stage-coaches, running from Baltimore to Philadelphia, for the transportation of passengers and goods and merchandise for hire; that previous to the goods in question having been delivered for transportation, the defendant published in the various newspapers in Baltimore, the time when the stages would start from, and arrive at, the respective cities, in which publication are the following clauses, viz.: "Fare and allowance of baggage as usual. All baggage to be at the risk of the owners thereof. All baggage over twenty pounds will hereafter positively be charged and be at the risk of the owners thereof." Which advertisement, before the delivery of the case of senshaws, was known to the plaintiffs.

The question for the consideration of this court is, whether the county court erred in their judgment? Whether the owners of stage-coaches, which are principally engaged in carrying of persons, and such baggage as usually accompany them, but who also, as in the case before the court, carry goods and merchandise for hire without the owner accompanying them, can, by such advertisements, exonerate themselves from all responsibility for goods and merchandise delivered for transportation need not, in this case be determined. For, as such carriers would without such publications be responsible for the loss of goods delivered to be carried, if they can, by their publications exempt themselves from their liability, then the publications, in the language of the exception, should be plain, explicit, and free from all ambiguity. But, as in the case before the court, the defendant, in the advertisement published by him, has used the most doubtful and ambiguous language, he therefore stands in the same predicament as if no publication had been made.

Judgment affirmed.

SLOAN v. WILSON.

[4 HARRIS & JOHNSON, 322.]

CONSIDERATION OF GUARANTY.—A promise in writing, signed by the defendant, to pay to plaintiff the amount of a certain note made in plaintiff's favor by a third person, in consideration of the plaintiff's renewal of such note, in case the maker fails to pay at maturity, is a sufficient memorandum in writing to take the case out of the statute. When the renewal took place, the consideration attached, and the defendant's liability commenced.

APPEAL from the county court in an action of *assumpsit*. It appeared that one Fowble, being indebted to the plaintiff below, Wilson, in a certain promissory note, which the maker was unable to pay at maturity, defendant, Sloan, wrote to plaintiff the following: "Baltimore, sixteenth —, 1806. Mr. Wilson. Sir: The small note you hold of Mr. Jacob Fowble for two hundred and ninety-two dollars, if you will be so good and renew it for him, I will guarantee the payment of it at sixty days. Jas. Sloan." Plaintiff did renew the note, and the same not being paid, this action was brought. Verdict for the plaintiff.

Winder, for the appellant. The memorandum is not such an agreement in writing as will take the case out of the statute: *Chaplin v. Rogers*, 1 East, 194; *Chater v. Becket*, 7 T. R. 200; *Ansley v. Marden*, 4 Bos. & P. 132; *Grant v. Naylor*, 4 Cranch, 224; 1 Pow. on Con. 6; 1 Com. Dig. 400. It does not contain a good and sufficient consideration: *Wain v. Warlters*, 5 East, 10; *Sears v. Brink*, 3 Johns. 210, 215 [3 Am. Dec. 475]. The engagement was not mutual, and was wholly executory: *Egerton v. Matthews*, 6 East, 307; *Cooke v. Oxley*, 3 T. R. 653.

Hoffman, contra.

By Court, BUCHANAN, J. The question raised in this case is, whether the letter from the defendant below to the plaintiff of the sixteenth of September, 1806, is such an agreement as will, under the statute of frauds, sustain an action against the defendant for the amount of Fowble's note, Fowble having failed to pay it? Of which no doubt is entertained.

An agreement to pay the debt of another must be in writing, signed by the party to be charged therewith. There must be a consideration for the promise, and that consideration must be set out in the agreement, and cannot be the subject of parol evidence. The absence of either of these requisites to a good agreement under the statute would be fatal; but here neither is

wanting. The letter to the plaintiff is signed by the defendant; the renewal of Fowble's note, for two hundred and ninety-two dollars, is the foundation of the guarantee, and is a good and sufficient consideration, and that consideration appears on the face of the writing. When the renewal took place, the consideration attached, and the liability of the defendant commenced; and whether Fowble's note was renewed or not, was a matter proper to be left to the jury on the evidence in the cause.

Judgment affirmed.

TANEY v. KEMP.

[4 HARRIS & JOHNSON, 342.]

QUESTIONS WITNESS MUST ANSWER.—A witness, upon an issue between other parties, and in which he has no interest, is bound to answer questions touching the issue in that cause, although the answer thereto may expose him to a civil action.

APPEAL from the county court. Trover for a bill obligatory. During the trial a witness was asked a question, the answer to which, he alleged, would subject him to a civil action, or suit in chancery, and refused to answer. The court ruled out the question, and the verdict and judgment being for the defendant, the plaintiff took this appeal.

Taney, in propria persona.

T. C. Worthington, for the respondent, cited *Norwood v. Norwood*, 3 Har. & J. 57; *Tills v. Grevett*, 2 Ld. Raym. 1008; *Peake's Ev.* 184; 1 Phil. Ev. 43.

By Court, DORSEY, J. The question arising in the bill of exceptions in this case is, shall a witness be compelled in a court of law to answer a question touching the issue in the cause, where such an answer may expose him to a civil action. It is well established that a witness shall not be obliged to answer questions which may subject him to a criminal prosecution, or to a penalty or to a forfeiture. But whether a witness shall be excused from answering questions, which might affect his pecuniary interest is a point upon which difference of opinion has prevailed. It is believed that the course of justice would be greatly obstructed by permitting the witness to shelter himself under this plea. If the witness has a knowledge of facts in the establishment of which parties to a suit are interested, is it not highly just and convenient, and does not the due administra-

tion of justice require that the witness should disclose his knowledge of the fact in controversy? It is true that the witness by disclosing such fact may expose himself to a civil suit, and thereby be compelled to do justice to his creditor. And shall this consequence, so consonant to all just and moral principles, excuse the witness from giving testimony on an issue between other parties, and in which he has no interest?

The witness on a bill filed in the court of chancery against him by his creditor for a discovery in aid of the jurisdiction of a court of common law, could be compelled to disclose the same facts which he is called on to disclose as a witness. If the witness, therefore, can be compelled in chancery, at the instance of his creditor, to make the disclosure, why should he not be compelled in a court of law to answer the same question between other parties? The witness claims an exemption on the ground that he is not obliged to answer questions which may affect his interest. We have seen that he is bound at the instance of his creditor to answer such questions. The defense, therefore, cannot be maintained. The court are of opinion that the court below erred, and therefore reverse their judgment.

Judgment reversed, and *procedendo* awarded.

See *People v. Herrick*, *ante*, 364.

WHITE v. WAGNER.

[4 HARRIS & JORDON, 573.]

WASTE BY LESSEE.—A tenant is generally responsible for all waste done to the premises, not caused by the act of God, or the public enemy, or the acts of the lessor himself. And where a house, which a lessee for a year held under a lease without special covenants, was destroyed by an armed mob, which the lessee had reason to believe would attack the house on account of his using the same for the purpose of distributing a certain newspaper, it was held that the lessee was liable in an action on the case in the nature of waste.

APPEAL from the county court. Trespass on the case in the nature of waste, for the injury and destruction done to the plaintiff's house, in the city of Baltimore, by a mob, the defendant being the plaintiff's lessee at the time. It was admitted that the defendant had taken possession of the premises under a lease for a year, in which there were no covenants, or agreement relative to repairs, etc., other than such as are implied by law, and that he had leased the house for a dwelling-place for

himself and family. It appeared that the defendant occupied the house for the purpose of receiving and distributing a certain newspaper, "The Federal Republican," printed in Georgetown, and of which the defendant was an editor and proprietor; that fearing the house would be attacked by a lawless, armed and unknown body of men if he continued to distribute the said paper, defendant collected, in a peaceable and lawful manner, a number of armed men, to defend the house against any attack that might be made; that the house was attacked, the defendant and his family forced to leave, and the building ruined, spoiled and destroyed, by a large multitude of armed, unknown persons. The court directed the jury that the plaintiff was not entitled to recover; whereupon a verdict was found for the defendant. The case was argued before this court on the second bill of exceptions relating to the sufficiency of the evidence to justify a verdict for the plaintiff.

Pinkney and Raymond, for the appellant.

Winder, *contra*, urged that this was a case of permissive and not voluntary waste, the consent of the tenant being essential to constitute the latter: *Attersoll v. Stevens*, 1 Taunt. 189; and that no action would lie for permissive waste: *Countess of Salop's case*, 5 Co. 13; *Gibson v. Wells*, 4 Bos. & P. 290; *Herne v. Bemlow*, 4 Taunt. 764; that a tenant could not be called a *tortfeasor* for acts done which he could not prevent and did not consent to.

By Court, BUCHANAN, J. Judgment reversed on the second bill of exceptions.

JOHNSON, J. The action in the case was brought in Baltimore county court, to recover damages for a dwelling-house, on Charles street, in the city of Baltimore, which was materially injured during the time it was let by the plaintiff to the defendant.

The facts, as they present themselves on the bill of exceptions are: (He here stated the case.)

The declaration contains two counts, the one an action on the case in the nature of waste, the other on an implied undertaking to restore the property in good tenantable repair, alleging as the breach the destruction of the property by the defendant. Actions of the present nature have been seldom if ever brought in this state; indeed, a transaction similar to the present never before, and it is greatly to be deplored ever did, and it is hoped

never will arise again, in which private property has been by force destroyed against the exertions of the civil authority, collected on the spur of the occasion for its preservation. But as the property has been destroyed as between the landlord and tenant, the question is, who must bear the burden of the loss? In forming an opinion on the present subject, it is not necessary to trace the law of waste as it existed at common law, or as changed by the statutes of Marlbridge and of Gloucester. It is sufficient to observe that those statutes make a lessee for years liable to the action of waste, in which, when determined against the tenant, he forfeited the place wasted, and was compelled to pay treble damages.

Waste, *vastum*, is a spoil or destruction in houses, etc., to the dishension of him that hath the remainder or reversion in fee-simple or fee-tail. The removing wainscot, floors, or other things once fixed to the freehold is waste: Co. Lit. 53; 4 Rep. 64; 2 Blk. 281. Waste is voluntary, a crime of commission, as pulling down a house; or permissive, which is matter of omission only, as by suffering it to fall for necessary repairs. If the property in question had been destroyed, as set forth in the plaintiff's claim, by the defendant himself, or by others at his instance, it is clear he made himself liable to an action of waste, wherein not only would have been recovered the house let, supposing the lease not expired, but treble damages. The injury done to the property would have assumed the denomination of willful waste. But as the destruction was not, in the common acceptance of the term, made by himself, or by others at his instance, is he liable? It is not novel in the law to make persons, morally innocent, responsible for the acts of those over whom they had no control. In various instances, where the property of the owner is placed in the care of another, such person is liable to the owner for its loss or for injuries done to it which the possessor could not restrain. The common carrier, the innkeeper, the sheriff, and others not thought material to enumerate, are responsible for losses which they could not prevent. They stand liable to the owner for all losses, whether sustained by highway robbers or others, no matter how uncontrollable and irresistible may be the force with which they are assailed. The act of God, and of the public enemies, will only free them from the demand, when the loss proceeded from such act or such enemies, and then only when they are free from every exception. If the law was otherwise, by conniving with the robbers and thieves, no property could

be safe in their custody; it would scarcely ever be in the owner's power to ascertain whether the loss was the result of concert or of force; whether the alleged attack might or might not have been resisted. To free them from all temptation to swerve from their duty, and to secure an effectual remedy to those who intrust them with their property, all excuses of the kind spoken of are precluded; for it is better that occasionally the loss should fall on an innocent person than to relax and in effect to defeat all liability.

At the common law all such as were liable to the action of waste, no matter what might be their situation, no matter what might be the power to repel the waste from being done, if it was committed they were bound to respond. The infant age of the tenant would not free him from the responsibility. Under the statutes of Marlbridge and Gloucester, the same liabilities are cast on the tenant for years. The defendant in the case before the court comes within the purview of those statutes, and must therefore be responsible, unless the overwhelming force by which the injury was done exonerate him. As the property of the landlord is placed in the tenant's possession, who has the legal power to prevent all waste from being done to it, and to recover for it when committed, as in most instances it would be impossible for the landlord to ascertain in time, or come at the wrong-doer, it appears to have been the policy of the law to cast the liability on the part of the tenant for all waste committed on the property, except when caused by the act of God or of the king's enemies. But let it, for argument's sake, be conceded that if the defendant had continued to use the house for the purpose it was let to him, and that whilst so used the lawless multitude attacked and destroyed it, that he would not have been liable, a point not necessary to be determined in this case; yet as he did of his own authority, without the consent of the plaintiff divert the house to a totally different and much more dangerous purpose, well aware of the risk which the property would thereby have to encounter, on principles of law and justice, as between him and the plaintiff, he becomes responsible for the consequences.

If the common carrier, who puts to sea during a storm, or on its approaching cannot exonerate himself from the loss the storm may produce, which he attempted to buffet, so it appears equally just that a tenant, who applies the property to a different purpose than it was let to him, aware of the great increase of risk in consequence of such diversion, must bear, and not

cast the responsibility on the landlord. My opinion, therefore, is, that on principles of law and justice the merits of the case are with the plaintiff. The action of waste appears to have given way to, or been superseded by, the action on the case in nature of waste, which is the first count in the present declaration. Two grounds have been relied on against the first count: 1. That the evidence does not support the count; and, 2. That if the defendant was liable, yet as the waste was permissive, and not voluntary, an action on the case in the nature of waste will not lie. The declaration, it is true, states the destruction of the property to have been made by the defendant, and by those taken into the house by him. In common parlance a person cannot be said to have done an act which was done by another, nor can he be charged with causing a destruction to take place when every exertion in his power was used to prevent it. But in the legal acceptance of the charge, he who does certain acts by others, is said to have done them himself: *Qui facit per alium, facit per se*. If the tenant is generally responsible for all waste committed by strangers, no matter how overwhelming the power, how much more strong is the case before the court, when the property in question was applied to a different object than that for which it was let; the defendant having reason to believe that in consequence of such application "the house would be attacked by a lawless, armed and unknown multitude." As between the plaintiff and defendant the acts of the multitude produced by the acts of the defendant, and those in concert with him, must be imputable to the defendant himself, and of course the charge, as contained in the count is correct.

The second objection to the count by the preceding reasoning is also removed; for if the defendant is to be liable as of himself for the waste committed by the lawless multitude, then it follows that the destruction to the property in question comes strictly under the denomination of voluntary waste, for which no doubt is entertained but that the present action is applicable. It would then appear that there is no need to form an opinion, whether the action on the case, in the nature of waste, will or will not lie for permissive waste; but the inclination of my mind is, that that action will be sustained as well for the one as for the other description of waste. It is a form of action, long since introduced, to recover for such injuries. It is an equitable action, and ought not to be discountenanced; it confines the recovery to the real loss sustained, and I see no reason to say

that it will not lie in all cases, and against all persons, who are at common law, or under the statutes of Marlbridge and Gloucester, made liable to the action of waste. As the case is covered by the first count in the declaration, I deem it totally unnecessary to add whether the evidence sustains the second.

The opinion of the court below, as pronounced on the second bill of exceptions, is erroneous, and the judgment obtained in consequence thereof is reversed.

MARTIN, J., dissented.

Judgment reversed, and *procedendo* awarded.

BARNEY v. SMITH.

[4 HARRIS & JOHNSON, 486.]

PROMISE TO SURVIVING PARTNER.—In *assumpsit* by a surviving partner, upon a promise alleged to have been made to both partners, upon the plea of the statute of limitations, it was held competent for the plaintiff to give evidence of an acknowledgment to himself alone, after the decease of his partner, of a debt due to the partnership.

APPEAL from the county court. *Assumpsit* by the present respondent as surviving partner of S. & J. Smith. The declaration contained counts for money had and received, for money laid out and expended, and on an *insimul computassent*. The promises were stated to have been made to S. & J. Smith, in the life-time of John Smith. Plea, *non-assumpsit*, and statute of limitations. The action was brought to recover the amount of certain demurrage paid by the French government to defendant, S. & J. Smith's agent, which money defendant converted to his own use. The principal question in the case was, whether certain acknowledgments made to the plaintiff, S. Smith, the surviving partner, within three years prior to the commencement of the action, were sufficient to entitle the plaintiff to recover, the promises being alleged in the declaration to have been made to S. & J. Smith.

Verdict for the plaintiff below.

Williams and Pinkney, for the appellant, compared this case to that of an executor declaring upon a promise made to himself as for one made to the testator, in which form it was contended the executor would not be entitled to a recovery: 1 Chitty Pl. 204, 205, 843; *Sarell v. Wine*, 8 East, 409; *Hickman v. Walker*, Willes, 29; *Secar v. Atkinson*, 1 H. Bl. 105; *Beard v.*

Cowman, 3 Har. & McH. 153; *Harris' Ent.* 161, 162, 179; *Tbm v. Goodrick*, 2 John. 218.

Winder, contra.

By Court, CHASE, C. J. The court are of opinion that the act of limitations does not operate to extinguish the debt, but to bar the remedy. The act of limitations is predicated on the principle that from length of time a presumption is created that the debt has been paid, and that the debtor is deprived of his proof by the death of his witnesses, or the loss of receipts. It is the design of the act of limitations to protect and shield debtors in such a situation. And consistent with this principle, and this view, the decisions have been made that the acknowledgment or admission of the debtor will take the case out of the act of limitations, because, if the money is still due and owing, the defendant has not suffered from lapse of time, nor has any inconvenience resulted to him therefrom.

The case of a surviving partner is distinguishable from that of an executor. An express promise made to an executor creates an *assumpsit* to him, and is founded on the antecedent consideration of a debt due to the testator, and a count in the declaration must be framed on it, and the proof must correspond with and be adapted to it. The money when received will be assets in the hands of the executor, and he will be accountable for it. A surviving partner has a right to all the effects belonging to the partnership. The right and remedy are united in him, the original promise made to him, and his deceased copartner still exists, and the right of action with the remedy survived to him. The acknowledgment to the surviving partner saves and preserves the remedy in the survivor, and avoids the bar by the act of limitations. It does not create a new *assumpsit*, but is a saving of the remedy on the original promise. The surviving partner is accountable to the creditors of the firm, and to the representatives of the deceased partner.

The court are of opinion that the judgment of the court below be affirmed on both bills of exceptions.

JOHNSON, J., concurred.

This case is approved in *Oliver v. Gray*, 1 Har. & G. 215; and *Berry v. Harris*, 22 Md. 39.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

HOWATT v. DAVIS.

[5 MURFORD, 24.]

STORAGE IN TRANSITU.—In case of a sale of personal property, not executed by delivery, and to be consummated by a delivery at another place, although in consequence of earnest paid, or otherwise, the property is so vested in the vendee that on complying, or offering to comply, with the contract on his part, he might recover the same from the vendor or his agent; yet, until delivery, and while the goods are *in transitu*, the seller may, on the vendee's becoming bankrupt, or being likely to become so, arrest the goods, or order his agent to arrest them.

FACTOR'S LIABILITY TO PRINCIPAL.—If a factor or agent having sold goods belonging to his principal, be ordered by him not to deliver them to the buyer, while they are still *in transitu*, there being doubts as to the buyer's solvency, and the factor delivers them notwithstanding such order, and without receiving security, he will be responsible to the principal for the loss sustained by reason of the buyer's insolvency.

APPEAL from the district court. Action on the case brought by Davis and Chalmers, partners, against Howatt and others, partners. It appeared that the defendants were commission merchants, and received from the plaintiffs fifty hogsheads of tobacco, to be sold by them. The defendants, as plaintiffs' agents and factors contracted, August 10, 1802, with Cowper & Co., of Norfolk, then in good credit, for the sale of the tobacco, agreeing to take in payment therefor sundry barrels of pork and promissory notes for the residue. On the same day, the pork was delivered to the defendants. On the thirty-first of August, 1802, plaintiffs learned that Cowper & Co. had become insolvent, and immediately, on the same day, notified defendants, who still had possession of the tobacco, not to deliver it

to Cowper & Co., without receiving their notes with approved indorsers therefor. But the defendants did deliver the tobacco to Cowper & Co. on the sixth of September, 1802, who were then insolvent, and who did not give an indorser on their notes in payment.

Judgment for the plaintiff for the damage alleged to have been sustained.

Wickham, for the appellants.

Call and Geo. K. Taylor, contra.

By Court, ROANE, J. The court is of opinion that, by the general principles of law, a factor or agent is bound to pursue the lawful instructions of his principal, and that by his agent a principal can do any act in relation to the subject delegated which he might lawfully do by himself. The court is further of opinion that, in case of a sale of personal property not executed by delivery and to be consummated by a delivery at another place, although, in consequence of earnest paid or otherwise, the property is so vested in the vendee that on complying or offering to comply with the contract on his part, he may recover the same from the vendor or his agent, yet that, until delivery and while the goods are in legal phrase *in transitu*, the seller may, on the vendee's becoming bankrupt or being likely to become so, arrest the goods or order his agent to arrest them, which order, operating as an indemnity to the agent in addition to that arising from his possession of the goods, will be his guarantee for refusing to deliver them, and that the agent would also have a right perhaps, under circumstances, to demand other security from his principal which it would be incumbent on him forthwith to give, under pain of a right in the agent to go on and execute the contract by a delivery. Under the influence of these principles the court is of opinion that it was the duty of the appellants to have complied with the order of the appellees in this case by refusing to deliver the tobacco to John Cowper & Co., which is stated and referred to in the case agreed.

The court is further of opinion that the appellants, not having done this, but on the contrary having violated the said order by a delivery of the tobacco to Cowper & Co., they were liable to the action of the appellees, in the event of Cowper's insolvency, to make them reparation in damages, which right of action, however, might be waived and abandoned by the appellees after a full and fair disclosure of all facts and circum-

stances necessary for their decision upon the subject, which it was the duty and in the power of the appellants to have given. The court, referring to the facts agreed in the case in relation to this point, is of opinion that although standing singly there may be some expressions seeming to import an agreement by the appellees to look to Cowper & Co. and not to the appellants for payment, used in their letters, written after the delivery of the tobacco by the appellants Cowper & Co., and although a considerable time elapsed before the appellees stated categorically to the appellants that they should look to them and not to Cowper & Co. for satisfaction. These circumstances are not strong enough to induce the court to infer such waiver and abandonment in the present instance.

The case states that at the time of the delivery of the tobacco, John Cowper & Co. were, in "fact, insolvent, though this was not certainly known to the appellants." Although this was not certainly known to them, we are authorized to infer from the case, that the appellants had, on the sixth, when the tobacco was delivered, good reason to believe that such insolvency existed, and if so, while it formed an additional reason for the appellants to decline a delivery of the tobacco, they ought also, even then, to have given this information to the appellees. This is a stronger degree of evidence in relation to a bankruptcy, than a mere protest of bills, which may happen sometimes to men of the best mercantile credit. The last circumstance, however, only, and not the other and stronger evidence from which the appellants knew, though they did not certainly know, that Cowper & Co. were then insolvent, was communicated by the appellants to the appellees, and that, too, accompanied by some expressions indicating a hope that Cowper's affairs might not be so bad as was apprehended. It was under this degree of information that the appellees acted in using the expressions now referred to. But at any rate, after the eighth of September, when it is agreed that Cowper & Co.'s insolvency was ascertained and that they had stopped payment, it was the duty of the appellants to have given instant information thereof to the appellees. For want of such information, and from the character of the appellant's letters, the appellees may have been lured into a belief that they might get payment from Cowper & Co. Hence the expressions in their letters now referred to may have arisen; and hence, also, the delay in stating to the appellants that they looked only to them in this business. Both this delay and these expressions may therefore have arisen from the conduct of the appellants in

withholding or palliating the actual circumstances of the case; and, therefore, ought not to avail them in the present instance. There has not been such a prompt, frank and explicit communication on their part, as should, on the ground of these expressions and this delay, absolve them from a right of action, which had previously attached against them.

On these grounds, the court is of opinion to affirm the judgment.

Chancellor Kent, 2 Com. 542, referring to this case, among others, says: "The English law on the subject of this right (stoppage in *transitu*), and the class of cases by which it is asserted, have been very generally recognised and adopted in our American courts."

See *Parker v. McIver*, 1 Am. Dec. 656, and *Stubbs v. Lund*, 5 Id. 63.

CHALMERS v. McMURDO.

[5 MURFORD, 362.]

INDORSEMENT BY ONE NOT A PAYEE.—The first indorser of a note in point of time, is not, of course, first responsible. If the payee of a note write his name over that of a person who indorsed the same in blank before delivery, but did so only on the ground of the payee's responsibility as first indorser, the payee will be liable as such in point of contract, though second in point of time.

APPEAL from the court of chancery. McMurdo filed his bill against Chepmel, La Serre & Co., the makers of certain promissory notes, payable to John and Wm. Bell, and indorsed by Bell & Co., Chalmers, Jones & Co., and Conway & Fortescue Whittle. The bill alleged demand upon the makers, who had failed and left the country, and notice to the indorsers, and prayed that the court fix the debt upon the party first responsible. The bill was taken for confessed as to Chepmel, La Serre & Co., the makers, and Conway & Fortescue Whittle.

It appeared from Bell's answer, that they were requested by the Fortescues to collect from Chepmel, La Serre & Co., a debt due them; that the latter gave their promissory note, with Chalmers, Jones & Co., as indorsers, payable to the Bells. The latter objected to the notes in that form, but being informed that no others would be given, received the same, and indorsed their name over that of Chalmers, Jones & Co., to make them negotiable without consideration, and merely to oblige the Fortescues, who assured the Bells that they should not be held responsible.

Chalmers, Jones & Co., answered that although they were

the indorsers first in time, yet that in point of contract the Bells, being the payees, were the first in liability.

The decree being that Chalmers, Jones & Co., pay the amount of the notes to the plaintiffs, their indorsement being first in point of time, this appeal was taken.

Leigh, for the appellants.

Gall, *contra*.

By Court, BROOKE, J. The court, admitting that a second indorser may, by agreement, become a first indorser in point of contract, which seems to have been relied on by the chancellor, is of opinion that the appellants, Chalmers, Jones & Co., do not appear to have placed themselves in that situation. On the contrary, it is admitted by John Bell, the surviving partner of John and William Bell, in his answer, that they were apprised by Chepmel, La Serre & Co., that the appellants refused to indorse the notes in question, unless there was some previous responsible indorser, which admission accords with the answer of the appelleants, in which they allege that they refused to indorse, unless the Bells, who were the payees, were the first indorsers. Nor does it appear that the appellants had notice that the Bells were only the agents of Conway and Fortescue Whittle in that transaction, as is alleged in the answer of John Bell. In this aspect of the case, the court is of opinion that no decree ought to have been made either against the appellants or John Bell, the surviving partner of John & William Bell; because the equity of the latter, until disproved in a controversy with Conway and Fortescue Whittle, would follow their indorsement, and affect the claim of the appellee, of which equity, if it were material, he admits in his bill he had notice.

The decree of the chancellor is therefore reversed.

See note to *Fitzhugh v. Love*, 3 Am. Dec. 568, where an indorsement of this kind is discussed.

HUNDLEY v. LYONS.

[5 MUMFORD, 342.]

EXCESS IN TRACT SOLD.—Whenever it does not appear that land was sold by the tract and not by the acre, the grantee is responsible for the excess of the number of acres above the estimated quantity; and in ascertaining the amount to be paid for such excess, the average value per acre of the whole tract is the proper rule.

EXECUTORY CONTRACT FOR SALE OF LAND.—If no day be specified for the delivery of the deed and of possession, in a contract for the sale of land, but the money is to be paid after the delivery of the deed, it must be understood that the deed was to be delivered and possession given without delay. If, therefore, on account of a misunderstanding of the parties in relation to the terms of sale, this is not done, the grantor is bound to account for the profits of the land after the contract, and the grantee to pay interest on the money from the time it would have been payable had the deed been immediately delivered.

APPEAL from a decree of the court of chancery. Lyons, the son and devisee of Peter Lyons, deceased, filed a bill in equity for the specific performance of a contract entered into between Peter Lyons and Hundley. It appeared that in 1807 letters passed between P. Lyons and Hundley relative to the sale of a tract of land containing a certain number of acres, for which P. Lyons was to pay a certain sum within six months after the deed should be executed, and the residue in annual installments. In one of the letters written by Hundley was the clause, "deducting for any deficiency of quantity, on a survey to be made at joint expense before deed executed." It appeared that before any deed was executed, the first thousand dollars in part of the purchase-money was paid; that a portion of the tract had been leased to George Toombs, who continued to pay rent to Hundley for several years; that Hundley's mother had a life estate in a portion of the tract, and after her decease Hundley occupied the same and received the profits thereof. In 1808 a survey of the land was made, and an excess of fifty-four acres above the estimated number discovered. There being some misunderstanding whether any excess should be paid for by Lyons, no further payments were made, nor the deed executed. Peter Lyons died in 1809, and after his death this suit was commenced. Defendant claimed interest on the unpaid purchase-money.

CHANCELLOR TAYLOR decreed that Hundley execute a deed for the premises to the plaintiff, who should pay for the excess at the average value per acre of the whole tract, and execute bonds with sureties for the installments, according to the original agreement; and that an account be stated, charging the plaintiff with the profits of that portion of the tract of which his father may have had possession, and crediting him with the interest on the one thousand dollars, part payment. Defendant appealed.

Wickham, for the appellant.

Nicholas, contra.

By Court, ROANE, J. The court is of opinion that, as it does not clearly appear from any final and conclusive agreement between the appellant and the testator, Peter Lyons, among the proceedings that it was the intention of the said parties to buy and sell the land, the subject of the present controversy, by the tract and not by the acre, there is no error in much of the decree before us as holds the representatives of the said Peter Lyons responsible for the average value of the surplus land found to be contained in the tract.

The court is farther of opinion that as the appellee has gone into a court of equity for a specific performance of the contract, which was probably only delayed from the misunderstanding of the parties and other causes, that contract should have been decreed to have been executed in specie, by causing the appellant to make a deed for the whole land to the appellee for his life, with remainder to his son Peter Lyons in fee, on his recovering from the appellee, or from the proper representatives of the said Peter Lyons, who for that purpose ought, if necessary, to have been made parties, the sums yet remaining due under the contract including, as part thereof, the average amount of the surplus land aforesaid, with interest from the expiration of eighteen months from the date of the contract, upon one third part thereof; with interest on another third from the expiration of twelve months thereafter; and interest on the remaining third upon the expiration of twelve months from the said last-mentioned day; and reserving to the appellant a lien on the said land, to secure the payment thereof, if necessary. And that the appellant, on his part, should have been decreed to pay the profits of the said land, after the date of the contract, whether derived from his own occupancy thereof, or received by him from others, and including the part held by his mother, after the period of her death. And that the appellee should have the liberty reserved to him to use the name of the appellant, if necessary, to recover any sums due from George Toombs for the use of a part of the land aforesaid.

The court is, therefore, of opinion and accordingly decrees that so much of the said decree as is hereby approved be affirmed, and that so much as conflicts herewith be reversed, with costs; and the cause is remanded for the court of chancery to be finally proceeded in pursuant to the principles of this decree.

RITCHIE v. MOORE.

[5 MURFORD, 388.]

RIGHTS OF HOLDER.—The holder of a bill of exchange, with indorsements in blank, may strike out the indorsements subsequent to the first, and may write over the first an assignment to himself, or the bill, without such assignment, will be considered the property of the holder, he having the power to make it.

SET-OFF BY PARTNER.—In an action against a partnership, a set-off of a debt due an individual member of the firm will not be allowed.

SET-OFF OF BILL.—In an action by the indorsee against the maker of a promissory note, the latter cannot set off a bill of exchange on which the plaintiff is responsible, unless it appear that the defendant had received such bill before notice of the indorsement of the note to plaintiff.

APPEAL. Moore brought two actions of debt on promissory notes made by Ritchie & Wales, and assigned to plaintiff by Chalmers & Co. At the trial, defendants offered to set-off against plaintiff's demand the amount of two bills of exchange drawn by Chalmers & Co. in favor of Ritchie individually, which bills had been returned protested for non-acceptance. The set-off was excluded, and verdict and judgment given for the plaintiff in both actions, they being tried together.

Leigh and Call, for the appellants, in support of their right to have the set-off, cited *Scott v. Trents*, 1 Wash. 77-79; *Armistead v. Butler*, 1 H. & M. 176; *Slipper v. Stidstone*, 5 T. R. 498; *French v. Andrade*, 6 Id. 582; *Mitchell v. Oldfield*, 4 Id. 128; *Hankey v. Smith*, 8 Id. 507.

Wickham, *contra*.

By Court, ROANE, J. These are two actions brought by the appellee as assignee of Chalmers & Co., of two promissory notes against the appellants. The notes having been protested, actions were brought thereupon, and were, by consent, tried together on the respective pleas of *nil debent*. Verdicts and judgments were rendered for the appellee in both cases. At the trial the appellants offered to set-off against the two notes aforesaid, the contents of two bills of exchange drawn by Chalmers & Co., in favor of Ritchie individually, which were returned protested for non-payment, on each of which bills there were two subsequent indorsements which had been obliterated by Ritchie and Wales. The partnership of Ritchie and Wales had been dissolved before the trial, but since the institution of this suit; and the counsel was employed to defend the company, and not either party individually. The court, on the motion of the

plaintiff, excluded the said set-off from going to the jury, on which there was an exception and an appeal.

The partnership, though dissolved before the trial, yet had existence for the purpose of defending the suit; and the bills in question being exhibited by the appellants at the trial, are to be considered as their property, and not the property of Ritchie only. They were well entitled, therefore, not only to strike out the names of the subsequent indorsers, but to write over the name of Ritchie an assignment to themselves; or the bills will, without such assignment, be considered as their property, by their holding them, and having it in their power to make it. As against Chalmers & Co., therefore, they would have had a right to discount them at the trial (whensoever they might have been acquired), such being the settled law of this country. But this action is brought by their assignee; and the law is, in case of assignments, that the assignee shall allow all just discounts, not only against himself, but also against the assignor, before notice of the assignment was given to the defendant.

Although these bills are to be taken as being the property of the appellants, as at the time of the trial, for the reasons already assigned, they are not to be considered in relation to the time of the defendants' receiving notice of the assignment, which in this case was, at least, that of the institution of the suit, at which time it does not appear that these bills were the property of the appellants, or even of Ritchie himself, but may have been the property of one of the subsequent indorsees. This view of the case is decisive of the question, unless, in this action against a company, we are authorized to allow a set-off of a debt due to an individual partner. This law is too strongly settled in the negative, and has been too often recognized by this court, to authorize us to do it, admitting that, as an original question, it ought to have been otherwise settled, which the court is by no means prepared to admit. On these grounds the judgment of the superior court is to be affirmed.

See note to *Gorgerat v. McCarty*, 1 Am. Dec. 270. Citing the principal case, Daniel on Neg. Instrs. 694, says: "Where there are several indorsements in blank, the holder may fill up the first one to himself, or he may deduce his title through all of them. He may, also, strike out any number of several indorsements. Thus, if there were six, he might strike out the fourth, fifth, and sixth, and sue on the others, but if he strikes out any intermediate one, he releases all who indorsed subsequently, as he deprives them of their recourse against him."

The same author, sec. 1428, says on the authority of the principal case: "A debt due by an individual partner in his own right, cannot be set off against a debt sued upon by the firm of which he is a member."

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

JONES v. GIBSON.

[N. C. TERM REP. 41.]

TAX SALE.—A sale by the sheriff of an entire tract of land for taxes on the whole, when a tax is due for part only, is void.

ACTS OF PUBLIC OFFICERS.—Whenever public officers exceed their authority, their acts are void.

EJECTMENT to recover a tract of land, containing three hundred and eighty-nine acres, part of a tract of three hundred and ninety acres. A tax was claimed by the state on the tract of three hundred and ninety acres, as unlisted land for the year 1802, 1803, and 1804; and on the twenty-fifth of November, 1805, the sheriff exposed the same to public sale, and sold it to the plaintiff, who undertook to pay the said tax for three hundred and eighty-nine acres, part thereof. The three hundred and eighty-nine acres were duly surveyed, and the sheriff made a conveyance to the plaintiff. On the trial it appeared, that a certain Samuel Hoover, claiming a right to one undivided third of the three hundred and ninety acres, had during the year 1802, 1803, and 1804, listed for taxes, one third of the tract, and had paid the same before the aforesaid sale. If upon these facts the plaintiff is entitled to recover either the whole of the three hundred and eighty-nine acres, or any undivided part thereof, then the verdict is to be set aside, otherwise to stand.

By Court,* SEAWELL, J. There is no analogy in principle between this case and those of selling for taxes without due advertisement; in which cases such sales have been held good.

*The court at this time was composed of Taylor, C. J., and Hall, Lowrie, Seawell, Cameron and Daniel, JJ. Cameron, J., resigned in November, 1816, when Thomas Ruffin was elected in his place, and became chief justice in 1833.

There, the officer did no more than he was authorized to do; here he has. He has in this case sold an entire tract for taxes on the whole, when no tax was due for one third part. He has not been satisfied with this; but has sold for the raising of two years' taxes upon the whole, when by law he had no right to sell at all, and which appears on the face of the deed. The purchaser therefore cannot show his title without exhibiting, on the face of it, an abuse of the authority under which the sheriff acted. But it is insisted that so far as the sheriff could have sold, his sale ought to be effectuated; and cases of powers derived from contract have been relied on. Now it may be a general rule, that in such cases the courts will sustain them where they have been executed in such a way that the act which the agent had authority to do, was properly done and was capable of being separated from that which there was no authority to do. But how in the present case can such separation be made? The selling of the land was not in a proper manner; for the sum raised was three or four times as much as the officer had authority to demand. No one, therefore, can tell how much would have been required to raise the tax lawfully demandable. If this was a case of private agency, we therefore see no principle upon which a court could presume to collect an intention to execute a power; for the act done, and the effect which results from an operation of the act, if it is to have any, are as essentially different from a proper exercise of the power as any two acts could be. In those cases of private powers, where the act has been done which the power authorized, though the agent may have done more—and the authorized act has been done in such a way that it may operate consistently with the authority—if innocent persons are likely to suffer, the law has said "that it will intend from the act and its effect that the agent designed to execute his authority, but has only done so in a bungling manner." But we think in the case of public officers, whose authority is not derived from any individual, that the law is clear; that wherever they transcend their authority the whole act is void; that the law for them, nor for any one else, will presume they intended to act properly: *Carpenter's case*, 8 Coke, 146. The sheriff, therefore, being a public officer, and having exceeded the limits of his authority, the whole of his act is void, and consequently the plaintiff cannot recover.

The act of assembly under which the sheriff sold, directs him to sell to the person who will pay the taxes and charges of advertisement for the smallest number of acres; and if no one

will pay them for less than the whole tract, to execute a deed to the governor for the use of the state. And when they are sold to an individual, the same act requires that the quantity purchased shall be separated from that not sold, by an actual survey made by the county surveyor, and the sheriff is to execute a deed accordingly.

From the state of the facts, it appears impossible that the present deed can prevail to its full extent, and by what rule or principle can its operation be directed? It cannot, in justice, be said that it shall be confined to the two thirds excepting one acre, because it is impossible to say how much land it would have required to raise the tax legally demandable; and on this score it is repeated that the purchaser by his own deed bears testimony against the justice as well as legality of his claim. But if the deed is to be confined to the two thirds, where is the excepted acre to be found? Not in the deed; but must require something further to be done, either by the consent of the parties or the compulsory process of law. Such a result is clearly at variance with what the legislature contemplated to follow, from the act it authorized the sheriff to do: *Dice v. Manningham*, Plowden, Com.; Wing. Max. regula. 99.

HALL and CAMERON, JJ., considered this case to come within the principle of those where a sale by a sheriff for taxes was held good, though the sheriff had omitted to advertise in the manner required by act of assembly.

BROWER v. WOOTEN.

[N. C. TERM REP. 70.]

NOTICE TO INDORSER.—Notice of non-payment, to an indorser, should be given by the holder, or by some person authorized by him. The indorser should be informed that he is looked to for payment.

ACTION against the defendant as indorser of a promissory note, payable in January, 1814, but by the indorsement made payable in October of the same year. The plaintiff brought his action against the maker and recovered judgment, but the execution was returned *nulla bona*. The officer who acted for the plaintiff in the collection of the money told the defendant that he should have to pay the amount of the note, but said that he was not authorized to notify the defendant. This action was then brought without further notice. The jury found, contrary to their instruction, in favor of the plaintiff. Motion for a new trial.

Henry, in support of the motion. Notice must be given to the indorser by the holder or his agent: *Tinsdale v. Brown*, 1 T. R. 171, and the insolvency of the maker will not excuse a strict compliance with the rule: 2 Hayw. 48 [2 Am. Dec. 617]; 2 Cai. 343; 2 H. Bl. 609. Where a verdict is contrary to the known rules of law, a new trial will be granted: 1 T. R. 171; 1 Johns. Cas. 336; 3 Johns. 180 [8 Am. Dec. 473]; 4 Burr. 2188; 1 Bay, 269; 2 Id. 23.

TAYLOR, C. J. An indorser undertakes to pay a note only in the event of the maker not paying it, and, therefore, when the indorsee receives the note, he undertakes to apply to the maker; and if, after it becomes payable, he is guilty of neglect and the maker becomes insolvent, he loses his recourse against the indorser. Notice is necessary to the indorser, because he is liable only in a secondary degree, and after everything has been done by the indorsee, which he engaged to do. It is not, therefore, enough that the indorser should be apprised of the default of the maker, but he should be distinctly notified that the holder looked to him for payment; for notice of non-payment might be accompanied with circumstances showing that the indorsee had, by his neglect, discharged the indorser. The notice in this case was of no more effect than if it had been given by a third person, because the constable was not authorized to give it. The insolvency of the maker creates no difference, and the law of the case forms its justice, where the reciprocal engagement of parties stipulates that something is to be done before a right of recovery can exist.

New trial ordered.

See, as to notice, *Stanton v. Blossom*, ante, 128.

SMITH v. McLEAN.

[N. C. TERM REP. 72.]

WHO ENTITLED TO NOTICE.—A person indorsing a note for the accommodation of the maker is entitled to notice of non-payment.

NOTE PAYABLE AT BANK.—Where a note is made payable at a particular bank, it should be presented there at maturity, otherwise the indorser is discharged, and the fact that the maker waives notice makes no difference.

ACTION on a promissory note made by D. Anderson in favor of the defendant, and indorsed by him. The note bore date No-

vember 9, 1811, and was payable six months from date at a certain bank. It appeared that Anderson being indebted to the plaintiff, he agreed to indulge him six months, provided he would give him his promissory note with the defendant as indorser. The note was then made and it was proved that defendant indorsed the same, without consideration, and for accommodation merely. On the maturity of the note, it was presented to the maker, who was unable to pay it, and who stated that he had then no funds in the bank, and asked that it be not presented there, as he hoped to have money soon. Plaintiff's agent placed the note in the hands of an attorney, with instructions to commence proceedings. In August, 1812, the latter brought suit against Anderson, in McLean's name, to the agent's use, and erased McLean's indorsement, without any authority to do so.

Although the plaintiff's agent was at McLean's house in July or August next after the maturity of the note, yet no notice of non-payment was given to defendant until February or March, 1813, when he expressed much astonishment, and urged the plaintiff's agent to collect the note from Anderson if possible, saying that if he, McLean, had to pay the note it would ruin him.

Verdict for the defendant. A motion for a new trial being refused, plaintiffs appealed.

McMillan, for the plaintiff, cited 15 East, 17; 1 Esp. 302; 2 H. Bl. 336; 1 T. R. 405.

RUFFIN, J. The counsel for the plaintiff has insisted that as the note was indorsed by the defendant without any valuable consideration, and merely for the accommodation of Anderson, the maker, and to give Anderson credit with the plaintiff, who received the note with knowledge that it had been indorsed with such intent, there was no necessity for notice of non-payment to be given to the defendant. I am of a different opinion. Whatever may be the rule with respect to bills of exchange, where the drawer has no effects in the hands of the drawee, I think that in this respect the law with regard to promissory notes is otherwise. The difference arises from the forms of the undertakings. The cases relied on for the plaintiff are one from 1 Esp. 302, and *De Bert v. Atkinson*, 2 H. Bl. 336. If the former be law, it is very distinguishable from this case. There the defendant, at the time of indorsing, expected to pay the note, and received the funds from the maker to do it with. But

the latter authority has been chiefly pressed, and is a case that has been often urged on this point. It, too, is unlike the case before us. There the insolvency of the maker was known to all the parties at the time of making and indorsing the note; and the opinion of the chief justice is founded on that circumstance. But if it were expressly in point, the authority of it would not perhaps be entirely admitted. In a short time after that decision, the doctrine of it came again under consideration in *Nicholson v. Gouthit*, 2 H. Bl. 609, and was at least shaken, if not overruled.

In this last case, the indorsement was made in execution of a previous agreement of the indorser to guarantee a debt of the maker, whose affairs were known at the time to be embarrassed, and who became insolvent before the note fell due. When the note became payable, the indorser knew that the maker could not pay it, and the impression of all parties was that the indorser was to pay it. In this case, strong as it was against the indorser, and great as the apparent justice of making him liable was, the court admitted the distinction between a bill drawn without funds or credit, and a promissory note of an insolvent maker, as to which latter the rule is laid down that notice of dishonor must in all cases be given. I believe this law has been considered as settled ever since, and that notice has in no case been dispensed with, unless perhaps it was on the express point of *De Bert v. Atkinson*, that is, where the insolvency of the maker was known to all parties at the time of indorsement. And it may be doubted whether even that exception would be now allowed.

For my own part I cannot perceive, either in common sense, or in the nature of an engagement of an indorser, any reason why an indorser, who has had no benefit, and who accommodated with his credit the maker, to whom all the value went, should not be entitled to the strictest notice. But this case does not come within even the weakest of the foregoing authorities. Here is no connection between the maker and indorser. There was no understanding that McLean was to pay in the first resort. On the contrary, he was astonished when he understood that Anderson had not paid; and so far from there being an insolvency of the maker, at the time of making or indorsing the note, or before or when it fell due, the case states that as late as August and September, 1812, he had visible estate to the value of six thousand or seven thousand dollars. How then can it be supposed that the defendant was considered as primarily liable to

Smith for the payment of the note? All the acts of the plaintiff falsify such a presumption, as well as the condition of the maker when the note was made and fell due. When the note became payable, the plaintiff wanted his money. To whom did he apply? To Anderson. Upon whose request did he give further indulgence? Anderson's. And what was the inducement to forbear? Anderson's promise to make payment in a few days, as well as an unwillingness to affect his credit by protesting at bank, where, as Anderson told him, there were no funds to meet the note. Indeed, there could be no reason for McLean to undertake an immediate liability, there was no necessity to the plaintiff that he should pay the note, the maker was well able to do it himself. On the particular circumstances, therefore, there is no hardship to the plaintiff; but there would be great hardship on McLean to dispense with a notice, which, if it had been given to him, might, and probably would, have enabled him to save himself out of Anderson's effects. Regarding this point of the case, therefore, according to the particular facts, or testing it by the general principles of the law, I am clearly of opinion that the defendant was entitled to strict notice of non-payment by the maker of the note.

But it is further contended that the conversation of the defendant with the plaintiff's agent, as stated in the case, amounted to a waiver of notice. I do not see any reason why it should. He certainly does not expressly waive it, and I cannot perceive why we should imply it. But if he had expressly waived the want of notice, and even made a new promise, I do not know that the plaintiff could have recovered, either on the count on the indorsement, or on the new promise. But there is no separate count on the promise. Indeed, according to my opinion already stated, the defendant had been previously discharged. Would not his promise, therefore, be *nudum pactum*, and void? However, I do not say how I would think on that point, being of opinion that there is nothing like a promise of waiver of notice in the case stated.

There is also another question which was not touched in the argument and is against the plaintiff in my opinion. The note was made payable at the State bank. The holder of a bill with a special acceptance payable at a particular place must present it there when it falls due, otherwise the drawer is discharged: 7 East. 385. As between the holder and indorser, a promissory note payable at a particular place is *quoad hoc*, precisely like a bill with a special acceptance as above as between the holder

and drawer. It is a part of the contract that the note should be presented at bank. Here indeed Anderson dispensed with such presentment; but that shall not affect McLean. His contract is that payment of the note should be demanded at the bank. How can we say that Anderson would not have found means to discharge the note at any sacrifice rather than suffer a public dishonor of his note by a protest at bank? Indeed, such a consideration might have induced the defendant originally to have the note made payable at bank. Be that as it may, the agreement was on special terms and those terms must be complied with by the plaintiff before he seeks any remedy against the defendant.

I agree, therefore, with the count below upon all these points, and think the verdict was right. It is unnecessary for me to say anything on the other questions respecting the authority of the attorney to strike out the defendant's indorsement, or the effect of such striking out, being in favor of the defendant on the other grounds.

SEAWELL, J. The striking out the indorsement by the authorized holder of the note not being by mistake but because it stood in the way of a suit he was prosecuting by the directions and for the benefit of the plaintiff, must forever exonerate the indorser from all liability. For what purpose was it stricken out? Was it that the bill was still to retain the qualities of one indorsed? Surely not. It was to place it in the same situation it would have stood if no indorsement had ever been made, and this the rightful holder was competent to do, for the indorsement was for his benefit; he might fill it up with what he pleased, either his own name or that of his principal, or might strike it out, as he has done. There can be no foundation for saying the attorney had no authority, for if he was the authorized holder of the note to bring suit, and in bringing the suit he did anything within the scope of such acts as belong to the office of an attorney to perform, the act is as binding on the principal as if done by himself, for would it be contended that an indorsement could not be struck out by the attorney of record, but that the court must require the principal to be personally present, giving his assent? The universal course of practice to the contrary is a sufficient answer to such a question. If the plaintiff has lost any benefit by the act he must bear it, as he was entitled to all the advantage which might have resulted from it.

The case states the indorser to be a mere security. What

would a court of equity say to a bill to set up a bond against one, where the obligation had been intentionally canceled by the agent of the person beneficially interested? It would say, being discharged at law, not by accident or mistake, there is no equity to revive it. You had the right and power to treat it as you pleased, and you have exercised it; but having repented, on being disappointed in your expectations, there is no reason to take from such security a defense which you have either generously or indiscreetly given him. In this case, the defendant is only bound by a legal tie, the indorsement; that being stricken out, he stands as another individual; and the law will never raise an implied promise where a court of equity would refuse its assistance, both are governed by the same equitable rules.

I concur with Brother Ruffin, also, as to the other point.

HARVY v. PIKE.

[N. C. TERM REP. 82.]

LIABILITY OF CARRIER.—The master is liable upon a bill of lading signed by him, containing no other exception than the dangers of the sea, though the goods are damaged by the unskillfulness of the pilot.

SUIT ON BILL OF LADING.—The shipper may sue either the master or owner upon a bill of lading signed by the master.

MOTION for a new trial in an action of *assumpsit* tried before Seawell, J. The plaintiff had shipped a quantity of merchandise on board a vessel, of which the defendant was master, to be carried from New York to Newbern. The bill of lading was signed by the defendant, and was in the usual form, containing no exception, other than that of the dangers of the sea. The merchandise was damaged on the voyage. The court instructed the jury that, if the damage was occasioned by the unskillfulness of the pilot after he came on board, the master was not liable. Verdict for the defendant.

Badger, in support of the motion.

Gatson, for the defendant, urged that the master was obliged to receive the pilot on board (Act 1783, 2, 20), who was then master *pro hac vice*, and the captain should not be held responsible for his acts: 1 Johns. 305. The captain is merely the agent of the owners of the vessel, to whom the plaintiff should have looked for indemnity: *Poots v. Lazarus*, 2 Car. L. Repos. 83.

TAYLOR, C. J. The question presented by this record is.

whether the damage done to the plaintiff's goods was occasioned by any of those causes, which according to the general rules of law, or the contract of the parties in the particular case, afford an excuse for not carrying them in safety.

Though there is a common form of bills of lading in use, yet like every other contract, it may be moulded according to the will of the parties by whom it is made; it may be framed without any exceptions, and then left to be construed by the general principles of law, or other exceptions than those usually inserted may be introduced, and thus the responsibility of the master or owner narrowed. In *Smith v. Sheppard*, Abbot, 165, there was no bill of lading, and the decision was made on general principles, applicable to common carriers, that the act of God which would excuse the defendant, must be immediate. Afterwards several exceptions were added to the form, and besides natural accidents, many which proceed from the agency of men, are now commonly provided against. But the parties in this case have thought proper to stipulate that only perils of the sea shall excuse the defendant for the non-performance of his contract, and therefore it is clear, that he undertakes, at all hazards, to indemnify the plaintiff against all other perils or losses. The unskillfulness of the pilot occasioned the loss; and as that is not a peril of the sea, the plaintiff is entitled to recover.

I think it is equally clear that the plaintiff has his election to sue either the master or the owner upon a bill of lading. The law will not compel him to search for the owners and sue them; they may be in a foreign country, or it might be impossible to find them: *Morse v. Slue*, Vent. 190, 238.

But I am not prepared to say that the master would not be liable, even in an action founded on tort, for damage done to the goods while the pilot was on board. The inclination of my mind is rather that he would be liable. The opinion of the court, in *Snell v. Rich*, 1 Johns. 305, seems to be founded on the circumstance that the master was not on board when the accident happened. In *Bussy v. Donaldson*, 4 Dall. 206, an action of tort was held to be maintainable against the owner of the vessel. And Molloy, who writes exclusively on maritime law, says: "But if a ship shall miscarry coming up the river, under the charge of the pilot, it has been a question whether the master should answer in case of the insufficiency of the pilot, or whether the merchant may have his remedy against both? It hath been conceived that the merchant hath his elec-

tion to charge either; and if the master, then he must lick himself whole of the pilot."

SEAWELL, J. The action in this case is founded upon the contract of the defendant, who undertook to deliver the goods in question to the port of Newbern, dangers of the sea excepted. They have not been delivered; and it is admitted by the case that this default has not been occasioned by any peril of the sea, but through the unskillfulness of a pilot. Now, it may be asked, if the circumstance that the vessel was to be placed under the direction of a pilot was not at least known to the defendant? And whether, if he had thought proper, he could not have provided against a loss whilst in the hands of the pilot? It is, however, sufficient to say the defendant has not provided against it; and being bound to insure against every accident or event not excepted, he must answer to the plaintiff for a non-performance. Had the defendant been charged with a tort for some injury done by the vessel whilst under the control of the pilot, that case would have differed widely from the present. The defendant in such case not being the author of the mischief, neither continuing it nor having it in his power to avoid it, would not be liable; but should he in such case have become insurer against it, it would hardly be doubted but that he would be liable upon his engagement.

The directions to the jury below were clearly wrong, and the rule for a new trial should be absolute.

RUFFIN, J., concurred with SEAWELL, J.

LONG v. MERRILL.

[N. C. TERM REP. 112.]

WHEN EQUITY RELIEVES.—A court of equity will not interfere where the ordinary rules of law afford complete and adequate relief; for the object of equity is to supply the deficiencies of the law. Therefore, where a person has a right to a ferry, and another sets up a free ferry adjacent, whereby the owner of the ferry loses his profits, an injunction will not be granted against the free ferry, because a court of law may place the owner of the ferry *in statu quo*.

BILL in equity. The opinion states the case.

By Court, SEAWELL, J. The complainant files his bill in equity of Rowan county, stating that he has a right to a ferry on the Yadkin river, and that the defendants had attempted to

obtain a ferry on the same river near the complainant's, by a petition to the county court; and that upon the determination of this court against the petitioners they have continued to set over persons, horses and carriages, toll-free, by which the complainant is injured in the loss of profits. The bill then charges that the complainant has commenced his action at law, and prays an injunction. To this bill is the affidavit of complainant verifying the charges set forth in the bill; whereupon the court grants the injunction, and from which the defendants appeal to this court. And the first necessary inquiry is, whether the case made by the complainant, is, if true, such a one as requires the assistance of a court of equity. And here, I think it may be safely laid down as a general rule, that a court of equity will interpose in no case where the ordinary rules of law afford a complete and adequate relief; for the very end of the institution of a court of equity is to supply the deficiencies of the law.

The ground which the complainant makes for coming into this court, is the loss of profits; but no difficulty in obtaining that loss is stated in the bill, and though we may suppose it probable that there may be some in ascertaining the number of persons set-over, yet the complainant does not allege it, or seek to discover it, but simply prays an injunction against setting over any others. As, therefore, the only injury or inconvenience which he alleges is one which his action at law is completely capable of encountering, and giving relief against by adequate damages, for aught he alleges, I see no reason for the interference of this court. For it cannot be said to be essential to the relief or assistance of the complainant, that this court should award the injunction prayed for. When I say adequate relief, I mean repairing the injury complained of, by placing the party *in statu quo*. And the many cases cited by the complainant's counsel, in which injunctions were allowed, all went upon the ground that a suit at law would not restore the party to his loss, but could only give him money in lieu thereof. If, therefore, the complainant had exhibited his own title, and had complained of a conduct in the defendants, which, if true, was both a *damnum* and *injuria*, I should still have thought, from the case made by the bill, there was no necessity for his calling upon a court of equity.

It is not necessary to give any opinion upon the other points raised in the argument, being clearly against the complainant upon the first.

LEGGET *v.* BLOUNT.

[N. C. TERM REP. 122.]

PROBABLE CAUSE.—In an action for a malicious prosecution, whether there was probable cause is a question of law, but the facts which go to show it must be ascertained by the jury.

ACTION for a malicious prosecution in taking out a warrant against the plaintiff and one Garret, charging the latter with perjury, and the former with subornation of perjury. The plaintiff produced a paper writing under the hands of the two justices, before whom the warrants were heard, from which it appeared that, as the justices did not agree that the parties should be bound over for trial, they were discharged. The plaintiff was willing to rest on this paper, as proof malice and want of probable cause; but the court requiring other proofs, the testimony of various witnesses on the part of the plaintiff and of the defendant was taken. The plaintiff then moved that the whole case should be left to the jury to decide whether there was probable cause. But Taylor, C. J., before whom the cause was argued, was of opinion that whether there was probable cause or not was a question of law for the court; and instructed the jury to find for the defendant, there being sufficient evidence of probable cause. The jury found accordingly. A motion for a new trial being overruled, the plaintiff appealed.

By Court, **RUFFIN, J.** Whether there was probable cause for suing out the warrant or not, I think is a question of law, after the facts are admitted or ascertained; that is, the court shall, upon a special verdict, give judgment; or shall say, after a general verdict, whether sufficient appears on the declaration to entitle the plaintiff to judgment: 1 T. R. 544. But the court cannot say to the jury, that the court is of opinion that probable cause has been proved, because that clearly involves an inquiry into the truth of the facts contested by the parties, and the credibility of the witnesses, which is the peculiar province of the jury. In other words, I think it would have been correct to say to the jury, if they believed the witnesses, probable cause had been made out; and as the whole case was passed on by the court, I think there must be a new trial.

Let the rule be made absolute.

SCOTT v. McALPIN.

[N. C. TRIM. REP. 158.]

CONVEYANCE BY ATTORNEY.—Where an attorney in fact conveys land in his own name, without reference to the power given him, or to his principal, nothing passes by the deed.

TRESPASS quare clausum fregit, and *liberum tenementum* pleaded. It was admitted that Abram Dubois, sen. had a fee-simple in the land in question before the year 1807. The plaintiff produced a copy of the records of the court of pleas and quarter sessions of Robeson county, dated July term, 1807, which recited "A power of attorney from Abram Dubois, sen., of etc., and Mary L. Dubois, his wife, to Abram Dubois, jun., which did appear to have been acknowledged before Robert Wharton, Esq., Mayor of the city of Philadelphia, was produced by the said Abram Dubois, jun., and ordered to be registered." Plaintiff then gave in evidence a deed from Abram Dubois, jun., to William P. Mix, dated July 31, 1807, and a deed from Mix to plaintiff, dated August 26, 1807. The deed to Mix stated that the grantor had full power and authority to convey. It appeared that soon after the execution of the deed to Mix, Abram Dubois, jun., applied to the clerk of the county court for the power of attorney, obtained the same, and never returned it, nor was it ever registered. After notice to defendant to produce the power of attorney, plaintiff gave evidence against defendant's objection, that it contained ample power to Abram Dubois, jun., to sell the land in question. Verdict for the plaintiff, and motion to set aside the same.

Browne, for the plaintiff.

By Court, DANIEL, J. We are all of opinion that the estate in fee-simple, which was in A. Dubois, sen., remained there, and could not be divested unless the deed had been executed in his name by himself, or by his attorney, if he had any. A power of attorney authorizes the agent to make use of the name of his principal. If A. Dubois, jun., thought proper to execute a deed for land in his own name, nothing passed by that deed but what A. Dubois, jun., had; and, as it is admitted that he had no estate himself, none could pass to Mix, under whom plaintiff claims. When land is conveyed by virtue of a power of attorney the purchaser is in, not from the attorney, but from the principal who retains the estate, until one of those deeds which will pass lands has been executed in his name by

the attorney. Who has the title? is the question submitted to us. We are bound to say, from the facts of the case, it is not in the plaintiff: 2 East, 142.

New trial granted.

See note to *McDonough v. Templeman*, 2 Am. Dec. 515.

FENTRESS v. ROBINS.

[N. C. TERM REP. 177.]

INJUNCTION DENIED.—Where a defendant might have availed himself of a remedy at law, equity will not sustain a bill for an injunction on the ground of an omission to prove a material fact in consequence of erroneous advice by counsel.

MOTION to dismiss a bill in equity on the ground that the complainant might have made defense in the trial at law, in which the judgment was obtained against which relief is now sought. The case appears from the opinion.

Norwood, for the complainant.

RUFFIN, J. It is admitted by the complainant that his case is one which might have been relieved at law; and the reason given why it was not is, that he did not attempt in a proper manner to prove a material fact in the trial at law; having been advised by his counsel that such proof was necessary [unnecessary?]. He now insists that it is in his power to make the necessary proofs, and prays to have an opportunity to do so here. In this point of view the bill is an appeal to this court for a new trial in equity. If a new trial had been proper, the court of law was entirely competent to grant it. It is a subject of the ordinary jurisdiction of those courts. But the complainant further says, that he did move for a new trial and was refused; and this refusal is made another ground for coming into this court. In this respect the bill is for relief against the errors of the judgment at law.

If these facts laid down any foundation for a suit in equity, there would soon be an end to all proceedings at law. Upon one or other of these points, either to hear errors of the court or retry the facts falsely found by the jury, all causes would end in chancery, and the courts of common law be abolished. It is unnecessary to say whether the opinion of the superior court was right or not, though it may well be doubted whether the mistake of counsel upon a point of law, as stated in the bill,

forms a ground for a new trial: *Zachary v. Lester*, in this court. Whether right or wrong, a court of equity is not to hear errors or reverse judgments at law. The case of *Ambler v. Wild*, 3 Wash. 36, has been cited by the defendant, and it must be admitted, that it goes the full length of the present case. But that decision is a solitary one, and I cannot allow to it the authority of overturning a long train of contrary decisions, and the oldest and best established maxims of our law.

Courts of law and courts of equity are both eminently useful, and, perhaps, alike indispensable. But they are very differently constituted, proceed by different modes, take cognizance of different subjects, and are intended for different purposes. In their original organization, their jurisdictions are separate, and it appears to me that their utility can only be preserved by keeping them unblended.

I am, therefore, of opinion that equity ought not, in any instance, to interfere, where a competent relief might have been had at law, and consequently that the bill must be dismissed.

The rest of the court concurred.

LASPEYRE v. MCFARLAND.

[N. C. TERM REP. 187.]

TROVER BY WHOM.—Trover cannot be maintained on the mere possession of a chattel, where it appears the legal title is in another, and that the plaintiff has only a trust.

TROVER for a slave of which the plaintiff had been in possession for fourteen years. The defendant showed no title in himself, but offered in evidence a marriage settlement entered into by the plaintiff, his wife and William Davis, whereby this slave among others, was conveyed to Davis as trustee, to permit the wife of the plaintiff to have the labor and profits, and to allow the slave to be under the direction of the plaintiff. Nonsuit ordered, and motion to set aside the same submitted to this court.

McKay, for the defendant. The plaintiff has an equitable title merely which this court cannot notice: 7 T. R. 43; 2 Esp. 500; 2 Str. 1078; 2 Johns. 221; 6 T. R. 684.

Mordecai, contra.

By Court, *RUFFIN, J.* This is an action of trover for a negro slave, and the question is, whether it is the proper action or not?

By the marriage settlement, the title of the slave is in the trustee, who permitted the plaintiff, however, to have the possession. It is one of the characteristic distinctions between this action and trespass, that the latter may be maintained on possession, the former only on property and the right of possession. Trover is to personals what ejectment is as to the realty. In both title is indispensable. It is true, that as possession is the strongest evidence of the ownership of chattels, property may be presumed from possession. And, therefore, a plaintiff may not, in all cases, be bound to show a good title by conveyances against all the world, but may recover in trover upon such presumption against a wrong-doer. Yet it is but a presumption, and cannot stand when the contrary is shown. Here it is completely rebutted by the deed, which shows the title to be in another, and not in the plaintiff. As to the plaintiff's interest under the deed, that is only a trust, and we cannot take notice of it. It is nothing here. A court of law can only regard legal rights, and if the plaintiff wishes to come into this court, upon his title, he must get the aid of his trustee, and proceed in his name.

Wherefore, I think the nonsuit must stand.

See note to *Hostler v. Skull*, 1 Am. Dec. 563.

WILLIAMS v. SHAW.

[N. C. TERM REP. 197.]

BREACH OF COVENANT OF QUIET ENJOYMENT.—The recovery of damages in an action of trespass *quare clausum fregit*, against one who has entered under a deed containing a covenant for quiet enjoyment, will constitute a breach of such covenant.

EVIDENCE OF EVICTION.—The judgment in such action is evidence to show the eviction, but is not conclusive against the warrantor as to the title of the land.

ACTION for the breach of the covenant of warranty in a deed conveying a certain tract of land to plaintiff. It appeared that plaintiff entered into possession under the deed, and commenced cutting down certain trees, when one McKethan brought an action of trespass *quare clausum fregit* against him, and recovered judgment. Shaw had notice of the pending action of trespass. This case came before the court on a demurrer to the declaration, setting forth the recovery in the trespass suit, and the title paramount in McKethan.

McMillan, in support of the demurrer.

Henry, contra, cited 4 Mass. 348; 4 Binn. 352; 4 Dall. 436, in note; 6 Johns. 158; 3 T. R. 337; 1 Johns. 517.

TAYLOR, C. J. It is a general rule that a covenant for quiet enjoyment is not broken without an eviction by better title; but it is wholly immaterial whether the eviction is effected by legal process, or by private disturbance and molestation. This point was made in one of the cases cited for the plaintiff, but afterwards abandoned as untenable. But if a legal recovery were necessary, I should not hesitate in considering the judgment in an action of trespass *quare clausum fregit*, as effectual for that purpose; because it is in this state a common and convenient mode of trying the title to land, of which there is no actual possession, and because enough appears in the averments of the declaration and the statement of facts to satisfy me that the title was put in issue in that very suit. It would be a strange method of warranting a title to land to leave the purchaser exposed forever to a legal claim of damages whenever he exercised the least act of ownership over it.

With respect to McKethan's judgment, it must be proper evidence to a certain degree, in order to show the eviction. But I think it has been decided by this court in the case of Shober, that it is not conclusive upon the seller, so as to prevent him from showing in an action upon the warranty that he has in fact a better title than the recoverer.

DANIEL, J. It is contended in support of the demurrer, that the covenant contained in the deed is nothing more than a covenant for quiet enjoyment; and as there is no allegation in the declaration of an entry and eviction under a lawful title, by legal process, the plaintiff is not entitled to maintain his action.

It is a well-settled rule that under a covenant of warranty the plaintiff must show a lawful eviction in order to maintain his action: 2 Johns. 4; 3 Id. 473; 7 Id. 258 [5 Am. Dec. 266]; 11 Id. 122. And the plain reason is this: If the eviction is not lawful, by some person having a better right to the possession, the covenantee would always be able, through the medium of the courts of justice, to maintain his possession and recover damages for the interruption; but if the eviction is lawful, the covenantee has no other remedy but on his covenant for quiet enjoyment: Id. 34, 35; Cro. Eliz. 914; Cro. Jac. 425. If the parties had inserted a covenant of seisin in the deed, and a breach had been assigned on that covenant, the case would have

been very clear. We are now called on to say whether there does not appear sufficient in this case to authorize the plaintiff to recover on the covenant contained in the deed, under the circumstances attending it; or, in other words, whether it was necessary for the plaintiff to allege and prove that he had been evicted by a legal title in an action of ejectment. It appears by the case that the plaintiff, by virtue of the deed, entered upon the land and had some timber cut and carried away; and the declaration states that McKethan, by a better title, entered and held him out of possession.

On an examination of the British authorities, it does not appear to be necessary for the plaintiff to show an eviction in consequence of an action brought against him and a recovery; it is sufficient that he state in his declaration that he was turned out of possession by one who had the legal title: 4 T. R. 617, 620; 2 Saunders, 181, note 10, Wms. edit. In the present case the title was fairly tried; the defendant, I. Shaw, had notice to defend; whether he did or did not does not appear from the case. The land being woodland and no actual possession, the possession then followed the title, and that the court and jury said was in McKethan. This is equivalent to an eviction under legal process.

RUFFIN, J. I am of opinion that the recovery in the action of trespass against the plaintiff, as set forth in the declaration, is such a disturbance of his possession as will form a breach of the defendant's covenant for quiet possession. In that respect it is tantamount to an actual eviction. But like an eviction, it must be upon prior and paramount title to enable the plaintiff to recover. Here such a title is stated in the declaration and admitted by the demurrer. Wherefore I think the demurrer must be overruled.

JONES v. ZOLLICOFFER.

[N. C. TERM REP. 212.]

PURCHASER FOR VALUABLE CONSIDERATION.—Equity, following the law, will not compel a purchaser for a valuable consideration without notice to give up any legal advantage he has over his adversary, nor compel a discovery of title, or title deeds or boundaries, nor to surrender title deeds, nor suffer testimony to be perpetuated against him. But where there is no more required than what a court of law would compel him to perform, equity will not protect him, and will not allow him to withhold the property of another.

PRIORITY OF LEGAL TITLE.—When a bill is filed by one having the legal title, but under such circumstances that he cannot obtain complete redress at law, it is no defense for the purchaser to plead that he purchased for a valuable consideration without notice. This will only protect an innocent purchaser after he has got the legal title.

FINDING OF JURY.—The jury can only find on facts put in issue; to find that a sale is “justifiable” is a conclusion of law beyond their province.

PRIORITY OF EQUITIES.—A junior equity can in no case prevail over an older one, except where it has also the legal title; the rule being that where there is equal equity on both sides the law shall prevail.

BILL in equity. The complainants claimed as legatees and next of kin to William Jones, deceased, by whose will the negroes sought to be recovered in this suit were devised to the use of the testator's wife for life, and then over to his children, the complainants. The widow acted as executrix, paid all the debts of the estate, and then died. The respondent claimed under a purchase from the widow; and the complainants alleged in their bill that such purchase was made after the debts of the estate had been discharged; that respondents paid a price proportionate to the widow's life estate merely, and that he knew that the debts of the estate had been paid, and that the purchase-money given for the slaves was applied towards the discharge of the widow's proper debts. The answer admitted the purchase, and alleged the belief that the slaves were sold for the support of the family.

The following was the material issue submitted to the jury: Whether the sale to Zollicoffer was for the purpose of paying the debts and expenses of the testator's estate, or the necessary expenses towards maintaining the children or young negroes belonging to the testator, or for the benefit of the widow only? And whether Zollicoffer had notice of the complainants' equitable claim when he purchased? The jury found that the sale was justifiable, and for a valuable consideration, and that the respondent purchased without notice. The court then decreed that complainants pay to Zollicoffer his costs. Complainants then filed a bill of review, to which respondent demurred.

By Court, HENDERSON, J. It is a maxim in equity that where equity is equal, the law will prevail. Under a mistaken application of this principle, the original bill was dismissed as to the defendant, Zollicoffer. To reverse that decree is the object of the present bill. A purchaser for a valuable consideration, without notice, has an equity equal to that of any one; and if he has any advantage at law over his adversary, a court of equity will not deprive him of it, although he may have ob-

tained it accidentally or even improperly. It will not compel him to discover his title, or his title deeds, the boundaries of his lands, to surrender up title deeds, although improperly obtained, or suffer testimony to be perpetuated against him, because a court of law would do none of these things. But when he is not called on to surrender any of those advantages; when nothing is asked of him but what a court of law would compel him to perform, it affords him no protection; and when he withholds from another his property, he shall be compelled to restore it, the court taking care that he shall not be deprived of any of his legal advantages. The case of *Collet v. De Gols, Cas. Temp.*, Talb. 65, so much relied on by the defendant's counsel, fully supports this opinion. A similar plea to the present protected Ward and his trustee, as to all the estates of the bankrupt, which the bankrupt had mortgaged prior to the bankruptcy, and which by assignment had come to Ward or to his trustee before the commission was sued out. For as to them, Ward had a legal advantage; he had the legal estate, and nothing but equities of redemption remained in the bankrupt at the time of his bankruptcy to forfeit by the act of bankruptcy for the benefit of his creditors; and when the assignee came into a court of equity to redeem the mortgaged estates, Ward's equity being equal to his, and he having the estate at law, it was decreed that the assignee should redeem, upon paying not only the money, for which the estates were originally mortgaged, but also the money paid by Ward, to the bankrupt for a release of the equities of redemption, although the equities were purchased after the act of bankruptcy committed, and when the bankrupt had nothing which he could sell. For Ward had the legal estate, an equity of redemption is unknown at law, and cannot be enforced in the court of law. And but for the interposition of a court of equity, the mortgaged estate, after default in the mortgagor, would remain forever in the mortgagee. Ward's equity therefore protected him in a court of equity, as he would have been protected in a court of law; and the truth of his plea was ordered to be ascertained.

But as to that property derived immediately from the bankrupt after his bankruptcy, and before commission sued out, the court directed Ward to account, regardless of the truth or falsity of his plea; for as to that he had no legal advantage. It is deemed unnecessary to examine further the cases cited in the argument, or to notice some expressions of the chancellor's, such as that a court of equity has no jurisdiction against a pur-

chaser for a valuable consideration without notice, and others of like import; for in all the cases the complainants were endeavoring to obtain something which the law would not grant, and the expressions of the chancellor were used in reference to such cases, and if not were extra-judicial. It is unnecessary to decide whether the allegations of the parties warranted the making up of the fifth issue, to wit: whether the defendant was a purchaser for a valuable consideration without notice. But it is very questionable whether the defendant had made in his plea or answer (call it which you will) any such allegation.

It is also objected that there has not been a final decree passed and enrolled in this cause. It is true those formalities which are used in England have not been complied with. But there is sufficient for this court to perceive that there was a decree pronounced in favor of Zollicoffer. The issue was made up under the direction of the court. It was found in Zollicoffer's favor, it was ordered that the complainants should pay him his costs; an interlocutory order was made as to the other defendants, and the cause progressed as to them, and rested as to him. According to the loose manner in which the decrees of the courts are taken, we must, in justice to the parties, consider this as sufficient evidence of a decree having been pronounced. It is therefore ordered and decreed that the decree dismissing the bill as to Zollicoffer be reversed.

Browne, on behalf of Zollicoffer, then filed a petition for a rehearing.

By Court, SEAWELL, J. The complainants in the original bill charge that William Jones, being possessed of the original stock of the original slaves in question, devised the use of them to his wife for life, and directed by his will that after his wife's death the slaves should be divided by his executors amongst all his children, and made the wife and his son William (one of the complainants) his executors. It further charges that the wife died in 1793, and that the defendant has possession of the slaves under some purchase for a small price, and with full notice of the children's claim, and that the plaintiffs represent the children. The bill also charges that the wife elected to hold as legatee, and that all the debts had been paid before the sale of the slaves, and prays that the slaves may be surrendered and the defendant decreed to account for their profits. The defendant, by his answer, in substance says: that he purchased from Sarah Jones (the widow), Brittain Jones, and Elizabeth,

two of the children, and William Perry, who it seems married one of the daughters of the testator; that the vendors assured him they could or would make a good title, and that he did not pretend to be a judge of its goodness but bought upon their assurance; that he understood the sale was made for the support of the family; that Elizabeth was at that time of full age.

Upon this bill and answer a jury is called upon to try the truth of the matters in dispute between the parties, and these matters in dispute can only be found by comparing the bill and answer and not by any issues otherwise made up; and it may be here remarked that everything charged which is not admitted by the answer must first be found by a jury before the court can act upon it, for, according to the constitution of our courts, the jury is to decide all matters of fact. The jury in this case found that the sale was "justifiable," and that defendant purchased without notice, and for a valuable consideration, upon which the complainant's bill was dismissed. Now it seems clear to us all, that it was the province of the jury to find only facts, or rather what the parties by the bill and answer submitted to them; that their finding the sale "justifiable" was a conclusion not submitted to them either by the bill and answer or indeed by the issues made up by the court; and we are free to declare that if the wife did elect to take as legatee, as charged in the bill, her power thereafter as executrix ceased, her assent operating for the benefit of those in remainder, the legatees thereby acquiring a legal title to that which before was an equitable interest. The effect then would be that the wife could only legally or equitably convey to the defendant what she herself had—a life estate. And, as to the effect of a purchase by an innocent man for a valuable consideration in such a case, we also hold that the rule in equity is clear, as between mere equitable claimants, or in other words, those who only have equitable titles that *qui prior est tempore potior est jure*, and that a younger equity can in no case prevail against an older but where it has also the law, for the maxim then is that there being equity on both sides the law shall prevail. In a controversy between such parties the legal party has been emphatically called the *tabula naufragis*, upon which either might support himself. When it is said that either may support himself by the legal title, it is meant that equity will not take away a legal defense from such innocent purchaser. When an equitable owner of property calls upon the legal owner for the title, which has been called the shadow, a court of equity regards the substance, and will in general compel him to surrender it, for it

would be contrary to the first principles of justice that he who has only a formal paper title should, without any merits, hold it and enjoy the benefits against him who has honestly paid his money for it. But when a court of equity is called upon to take away that right which the law would sustain if this legal owner can himself show equity, having the law and equity also, a court of equity will refuse its interposition, and in such case, leave it to the law to decide.

Whenever, therefore, any innocent, honest purchaser has armed himself with the law, though his equity might be postponed, a court of equity will not take away the defense; but if it amount not to a defense at law, the complainant in equity would be idly spending his money to obtain it. When a bill therefore is filed by one who has the legal title, but who comes into equity because he cannot be completely relieved at law, it is no defense for the defendant to plead that he is an innocent purchaser for a valuable consideration without notice, because the complainant is not seeking to disarm him at law, the defendant at best having but a wooden sword, incapable of protecting him against the assault of a legal claimant. This point was expressly determined by Lord Thurlow, in the case of *Williams v. Lawler*, 2 Bro. 264, where he says it does not apply against one seeking a legal claim, and is only a bar to an equitable title; and it is to no purpose to say that the case turned upon the claim of a widow, for that is not noticed by the lord chancellor. The counsel for the purchaser admitted that in the case of two equities, want of notice could make no difference, for the oldest must prevail. Courts of law afford a remedy where the plaintiff has a title to the thing in question, either by adequate damages or the possession of the thing itself. Courts of equity exercise no control over the property itself, but afford relief by acting on the person wherever the complainant has a title and cannot completely assert it at law, or where he has no effectual title, but only a right to have one. The right to have a title follows the property as an incident, so long as it continues to be owned by those who purchased with notice of this equitable claim, or by those who gave no valuable consideration for it; but when purchased, and the legal title actually passed, and for a valuable consideration paid before notice, then the incident is not dismembered, and such purchaser will stand in the shoes of his vendor. And it is the same if the conveyance was so defective that the legal title did not pass; for in such cases it remains as it would have done between two persons, both of whom had bargained for the same prop-

erty, but neither had obtained the legal title, they would neither of them have more than equities, and the rule *qui prior est tempore* must necessarily prevail. So if a person purchases a paper not negotiable, he obtains only an equitable title, and the consequence is, that the want of notice can make no difference. He is subject to all the equity of his vendor; and so the rule has always been, and does not arise from the form of action at law, for it was so held whilst courts of law respected equitable interests. But there are cases in which it is not necessary to apply to courts of law for assistance, as in the case of a bond to make title, which, if assigned, the assignee in equity must do the same equity which the assignor ought to have done before he could obtain a title. From this reasoning, it seems to me conclusively to follow that it is the legal rule which operates as a shield to the purchaser, and that Lord Thurlow was right in his application of the rule. And indeed, the books are full of cases where a younger purchaser, for a valuable consideration and without notice, has been permitted, after discovery of an older purchaser, to buy a prior incumbrance, and thereby protect himself. Now, if the rule laid down in argument were true, that whenever an innocent purchaser, for valuable consideration and without notice, was attempted to be disturbed, that such plea would of itself protect him, in other words, that the honesty of his purchase should defend him, it is remarkable that in all the cases alluded to, the honest purchaser was only protected after he had got in the legal title. The books, indeed, when speaking of those cases, say, where equity is equal, the law shall prevail, and that he who hath only an equitable title, shall not prevail against law and equity. And they lay it down as established doctrine, that a *bona fide* purchaser, without any knowledge of the defect of his title, may lawfully buy in every judgment or incumbrance, and though nothing be due upon it, yet if he can defend himself at law with it, his adversary shall have no aid in equity to set them aside; for being able to defend himself at law, equity will not disarm him.

The decree of reversal is confirmed.

It is held that a *bona fide* purchase for value, and without notice, is a good defense, not only against all prior equities, but against all adverse proceedings in equity, whether instituted to compel the purchaser to surrender what he has bought, or to make a discovery which might be used to his prejudice in a court of law: *Zollman v. Moore*, 21 Gratt. 313; *Carter v. Allen*, Id. 241; *Howell v. Ashmore*, 1 Stock. 82; *Demarest v. Wyncoop*, 3 Johns. Ch. 147; *Perkins v. Hays*, 5 Am. Dec. 680; *High v. Batte*, 10 Yerg. 335; *Owings v. Mason*, 2 A. K. Marsh. 380; *Tompkins v. Powell*, 6 Leigh, 576; *Heilner v. Imbrie*, 6 S. & R. 401; *Mundine v. Pitts*, 14 Ala. 84.

SLEIGHTER v. HARRINGTON.

[N. C. TERM REP. 240.]

PERSONAL LIABILITY OF EXECUTOR.—An executor who promises to pay a debt of his testator, and has assets at the time of the promise, is personally liable.

ACTION on a promise in writing made by the defendant's testator, who was the executor of one Troy, to pay a debt due from Troy to plaintiff. It was admitted that at the time of the promise the executor had assets. The question submitted to this court was, whether having assets alone, without any new contract, was sufficient to charge a person in a representative character on a promise so made, *de bonis propriis*.

Shaw, for the plaintiff.

A. Henderson, *contra*.

HALL, J. That an action will lie against an administrator or executor, upon a promise to pay in consideration of assets, seems pretty clear from the following cases: *Trevinian v. Howell*, Cro. Eliz. 91; *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, Cowp. 289; 1 Ves. 125. It is true, the cases cited from Cowper, are cases of legacies sued for, and although they have been much shaken, if not overruled, in the case of *Dicks v. Street*, 5 T. R. 690, the principle of decision in the latter case was upon a different ground from that now before the court. Two out of three of the judges held, that an action would not lie at common law for a legacy, because courts of law had no power to compel a husband, who sued for his wife's legacy, to make a settlement upon her, but a court of equity had. Not any of the reasoning in that case applies to debts which an executor or administrator promises to pay in consideration of assets, if they have money in hand, there is no reason why they should not pay; if they have property, which they use diligence in converting into money, and some accident happens to it not within their control; or if in the mean time they have notice of debts of higher dignity, they ought to be at liberty to show these things in their defense. See Coke, in *William Bane's case*, 9 Co. 94. The promise, as was said by Lord Mansfield, in *Cleverly v. Brett*, 5 T. R., note, eases the creditor from proving assets, and throws the *onus* on the other side. I think there ought to be judgment for the plaintiff.

SEAWELL, J. Where an action is brought against an executor or administrator upon his promise to pay a debt, if he has as-

sets, the promise will bind him *de bonis propriis*, and though in the declaration assets must be averred, yet proof of the promise is so far evidence of assets, as to place the want of them, to be proven by the executor or administrator. As the assets are the consideration which make the promise binding, whenever it shall be shown by the defendant that there are none subject to the plaintiff's demand, the promise is then *nudum pactum*, and will not support an action, and this the executor or administrator may do by any evidence which would protect him against the plaintiff if the action had been brought against the defendant as executor or administrator; as by payment without notice to inferior debts, or those of equal dignity or judgments, or by showing debts of higher dignity or the like. As this case appears to be a promise with assets, I think there should be judgment for the plaintiff. But I cannot assent to the opinion that the promise by the executor or administrator has any other effect than as regards the form of the action, and that this formal promise makes him personally liable, only because he was before liable as executor or administrator. I can see no analogy between the case of a promise to pay a debt of inferior degree, and the actual payment, for in the former, there is only an undertaking, but in the latter the thing is done, and it is not in the power of the executor to recover it back.

RUFFIN, J. The case is, that Troy was indebted to the plaintiff and died, having appointed H. W. Harrington his executor, to whose hands sufficient assets came to pay the plaintiff's debts. And that H. W. Harrington having assets as aforesaid, promised the plaintiff in consideration thereof, to pay the said debt; that he afterwards died, leaving the defendant his executrix. This action is brought against the defendant as executrix of H. W. Harrington, to subject his estate upon his promise. The defendant pleaded *non-assumpsit*, upon which issue was joined and a verdict for the plaintiff. A motion is now made in arrest of judgment, because there was no consideration for this promise.

I always considered it as a point perfectly settled, that the promise of an executor having assets at the time of the promise to pay his testator's debts, was valid. Upon looking into the authorities, we find many cases wherein it has been expressly decided, besides numerous sayings to the same effect in elementary books. Among others are the cases of *Trewinian v. Howell*, Cro. Eliz. 91; *Reech v. Kennegal*, 1 Ves. 126; *Bane's case*, 3 Co. 34, and those cited in the argument from Cowper. Such a promise is enforced and supported by the consideration

of the executor's liability, as executor, to pay the plaintiff's demand. He is liable by reason of the assets, and therefore the having of assets is indispensable in such a case. When I speak of assets, as relates to this subject, I mean such estate of the testator as would at that time be liable to the debt of the creditor, in a suit at law. If, for example, the creditor be so by simple contract, the assets in the hands of the executor necessary to support the *assumpsit* of the executor, must be such as the creditor would be entitled to recover if he were then suing the executor in his representative capacity for his debt. The executor, therefore, is the mere holder, as it were, of money which is in justice and conscience another's.

The consideration may, therefore, be said to consist of the strongest moral obligation as well as a legal liability. The only case relied on to contradict this reasoning, and the strong current of authorities for the plaintiff, is that of *Ram v. Hughes*, 7 T. B. 350. But in that case there was no averment of assets. It is said, indeed, that Hughes died possessed of sufficient effects. But it is not alleged that they ever came to the defendant's hands, much less that she had them at the time of her promise. The note of the case in term reports seems to me to be a confused one, but its accuracy in this respect is evinced by what fell from Lord Mansfield in *Hawkes v. Saunders*, Cowp. 291, where he mentions and comments on this circumstance. I agree, therefore, with my brethren that the plaintiff is entitled to judgment, but I cannot accede to the opinion that the defendant would have been at liberty upon the trial to show that her testator Harrington, after his promise, applied the assets to other debts of the testator Troy, and thereby excuse himself from the payment of this debt. If the promise was good at all, it made the debt personal. There is no half-way ground. Harrington must be considered as liable only in his representative capacity, if he is allowed to show the state of the assets subsequent to the time of his promise. But when we say that by his promise he became personally bound, we lose sight of the assets altogether, except so far as regards their situation when the promise was made. In that respect we are obliged to examine into them, for the purpose of ascertaining whether the promise was then good, or a *nudum pactum* if he then had assets, we all agree that the promise is good and he becomes personally liable. It appears to me that settles the other point, for whenever one becomes personally bound for the debt of another (no matter how), it becomes his own debt, and must be paid out of

his own estate. Nothing but actual satisfaction, or other matter, which would discharge him from any other of his own personal debts will discharge him from this.

In *Bane's case*, Lord Coke is express that an executor can only show, upon the trial, that he had no assets at the time of the promise. The short note of *Cleverly v. Brett*, cited in *Pearson v. Henry*, 5 T. R. 6, relates, as well as the principal case, to the question of assets on the plea of *plene administravit*, in a suit against the executor, as such, which is totally different from this. There the question is what assets the defendant has at the time of the plea pleaded, and does not regard the personal liability of the defendant at all.

DANIEL, J., concurred in opinion with Ruffin, J.

HASLEN v. KEAN.

[N. C. TRIN. REP. 379.]

EXECUTION OF POWER.—Where a power is created by deed, empowering a husband to appoint to whom the land shall be conveyed, and, in case of his death before his wife, empowering her to do it, there must be an actual appointment in the mode indicated, and not merely an intention in the husband, in order to defeat the wife's right of appointment. Accordingly, where a power requires, among other requisites, that the trustee should convey to such person as the husband should limit or appoint, and the husband executed an instrument of writing authorizing the trustee to convey to whom he pleases in his discretion, this is not an execution of the power, nor a destruction of that subsequently limited to the wife.

BILL in equity. Wilson Blount conveyed two tracts of land to Edward Kean, by a deed bearing date February 25, 1799, "upon trust that the said Edward Kean, his executors, administrators or assigns, shall and will at any time at the request of John Haslen, esq., of the colony of Demarara, in South America, or at the request of Catharine Henrietta Haslen, in case she should survive him, or in case both should die without making such request, then, at the request of the executors or administrators of the survivor of them, by good and sufficient deeds, such as the counsel of the said John or Catherine his wife, or the executors or administrators as aforesaid shall advise, convey in fee-simple the said several tracts or parcels of land, etc., unto such person and persons qualified to acquire, hold and transfer lands and other real estate in the state of North Carolina, as the said John Haslen, during his life, or Catherine H.,

his wife, after his death, in case she should survive, or the executors or administrators of the survivor of them, by writing signed in the presence of one or more credible witnesses, or by last will and testament duly executed shall direct, limit or appoint."

On the fifth of April in the same year, John Haslen executed the following instrument of writing, in the presence of one credible witness: "Whereas, by a deed of bargain and sale bearing date the twenty-fifth of February, 1799, between Wilson Blount and Ann his wife, of the one part, and Edward Kean, of the other part, two several tracts of land containing about eight hundred acres, with the buildings and improvements thereon lying in Craven county, were conveyed to the said Edward Kean, etc. And whereas also I, the said John Haslen, intend shortly to undertake a voyage to the colony of Demarara, in South America, and am apprehensive of the dangers to which my life will be exposed in the said voyage; now, therefore, know all men by these presents, that in consideration and in execution of the above power of appointment to be reserved to me, I do hereby direct, limit and appoint, that the land above recited and referred to, may and shall be conveyed, sold and aliened by the said Edward Kean, at his discretion, to any person or persons qualified to acquire, transfer and hold lands in the state of North Carolina." Haslen died in Demarara in March, 1804, and Kean died in August, 1804, neither of them having done anything further towards the execution of the power. Catherine Haslen, after her husband's death, executed a deed in the presence of two credible witnesses, whereby she directed the land to be conveyed to herself; previous to which she had become naturalized. This suit was brought by Catherine against the heirs and administrators of Kean, and the cause was submitted upon the above statement of facts.

Browne, for the defendant. If one has power to dispose of personal or real estate as he pleases, he is in equity considered as the owner: *Lapell v. Cornwallis*, 1 Atk. 465; *Hinton v. Tbye*, 2 Id. 172; *Bainton v. Warde*, 3 Id. 656; *Troughton v. Troughton*, 1 Ves. 9, 10. A devise of anything to be at the disposal of A. by his last will and testament, gives a fee to A.: *Robinson v. Durgale*, 2 Vern. 181; *Tobmlinson v. Deighton*, 1 P. Wms. 149, 152, 171; *Maskelyne v. Maskelyne*, 1 Amb. 750; *Standen v. Standen*, 2 Ves. jun. 589, 594; *Langham v. Nenny*, 3 Ves. jun. 470; *Pearson v. Otway*, 2 Wils. 6.

Gaston, contra.

SEAWELL, J. It seems to me that this case lies within a narrow compass, and that the whole question settles down into this inquiry, whether the husband, by the deed to Kean, completely and in due form executed this power? If he did, there is an end to the wife's power, if he did not, she is entitled to appoint. The present controversy is between pure volunteers, without any kind of consideration on either side. And the wife is entitled, unless there has been, not only an intention to appoint, but an actual appointment, and that in the precise form acquired by the power. This provision is proven by many authorities, *Dormer v. Turland*, in 2 P. Wms.; *Ross v. Ewen*, 3 Atk.; *Darlington v. Pulleney*, in Cowp.; Powell on Powers, 150, 163, and many others there cited are directly to that point.

This makes it necessary to inquire what manner Blount, the donor of this power, declared it should be exercised, so as to defeat the right of the wife? He requires that it should be by deed, executed in the presence of witnesses, and that by this deed Haslen, the husband, should limit and appoint to whom Kean should convey, provided such person should be qualified to take hold, and transfer lands in North Carolina. Then the first question is, has the husband appointed, and in the manner prescribed? That brings us to the deed by the husband to Kean. Does that appoint to whom Kean shall convey? No; it authorizes Kean to convey to whom he pleases in his discretion. This is a confidence which Blount did not think proper to confer on Kean, nor does he vest Haslen with such a power. It may be said, however, that Haslen took a beneficial interest under the power, for as he might appoint whom he pleased, he could consequently appoint himself. That will depend upon a fact which does not appear in this case, namely, whether he was qualified to take, hold and transfer land in North Carolina. If he was, then he had a beneficial interest. But it is indispensable for those who claim the execution of the power to show every circumstance necessary therefor.

But assuming it as a fact that the husband was qualified, and could appoint himself, and that having a beneficial interest could delegate this power, has Haslen exercised it? He has not. But then it is said, having already the legal estate, with Haslen's power, he might appoint himself. Does Haslen's deed say so? It only authorizes him to bargain, sell, alien and convey to any person in his discretion who would be qualified to take, hold, and transfer lands in North Carolina. In substance

the deed is, that Haslen authorizes him to sell to any person, being, as the deed declares, "about to take a voyage to South America," when, as the purchaser was to be looked for, it was not in the nature of things that Haslen could be present to appoint him. And though Haslen declares in the deed that he transfers that authority in execution of the power, it is only by reference to his power, and is tantamount to saying "in virtue of his power." It seems to me utterly impossible to read this deed and collect anything like the remotest intention in Haslen to effect any other object than a bare substitution. There is nothing in the deed which even implies that Haslen had surrendered or released to Kean the right of appointing, nor can I think there was anything in the deed which prevented Haslen from revoking it the next moment. The substitute then must necessarily stand in the shoes of his principal, and until he had bargained and sold the lands, as he was intrusted in his discretion to do, the power of the wife remained undefeated. To consider this deed as an execution of the power, and consequently a destruction of the power limited to the wife, could only be by a presumption very far-fetched, which I think we are not warranted in doing, in favor of a stranger and pure volunteer, especially when by so doing we are defeating the wife, who was an object of the donor's bounty. I say the donor's, for if it was the husband's bounty, she has still a stronger claim. And according to the light I have considered this case in, it seems to me that no release, or other act of the husband, save the appointment either by himself or substitute (if he had a right to delegate his power) could defeat the power of the wife, though he might expressly have declared it in the extinction of the wife's power. When I say appointment, I wish to be understood that in favor of purchasers, courts of equity, on account of the consideration, will effectuate them wherever defective, and will consider as done what the parties have agreed to do; but it comes to the same thing at last, and is an appointment in equity.

The result of the whole seems to be that by this deed, if it operated at all, the power of the wife was placed at the mercy of Kean, instead of the husband, and that thereby he acquired the power, and nothing more of defeating by his own act the claim of the wife, which before he could not, but that in both cases it required the exercise of this power. The consequence is that the wife having become qualified to take, hold and transfer lands in North Carolina, and having appointed herself the

heirs of Kean, who hold the legal estate, must convey to her. This case has been a subject of tedious litigation, and I have bestowed upon it all the attention which my time and situation would admit, and it very possibly may be that through my errors and those of my brethren who think with me, injustice is done the defendants by this determination, and I ought the more to distrust my own opinion, as it is not in accordance with that of one older in the profession than myself. But being placed here for the purpose of deciding, it is my duty to do so in the best manner I am able.

Many points were made in this case upon the difference in powers, and the effect of a release, but from the view I have taken of it, they have become unnecessary to be examined, considering the manifest intention of the deed, to be only a substitution of power. But if it were necessary, I should hold, that as those who claim an execution of the power must show it, they must of consequence show themselves qualified to be appointed. Aliens can take, so can they transfer, but they cannot hold lands; that, therefore, it does not appear the husband had any beneficial interest, if he had not, that it was then a mere personal confidence, which could not be delegated. And as to a release, that of course would have no effect if he had no interest to give up. But even if he had an interest, as the power of the wife was limited to her by the original donor, to be exercised in default of the appointment of the husband, that both being strangers and upon an equal footing, the husband, by a release, could only relinquish to the legal owner what he had, and that the only effect would be to lop off one power, in like manner as it was spent by death, for Blount who created both powers, and who, as the case appears, is to be considered the benefactor of both, has appointed Kean to hold the estate, subject to the appointment of the wife, in default of any appointment by the husband. And as the release could only destroy what the husband had, as between volunteers, it consequently gave Kean nothing but a dead power, it gave him no ground in equity to oppose the wife's claim, for that must be founded either in regular title, according to the prescribed form, or it must be founded upon moral obligation, which in equity dispenses with form. So long, therefore, as Kean continued to hold the lands, without any appointment being made by the husband, does the power of the wife remain alive.

I readily admit the execution of a power limited to strangers is to be fairly construed, and this I understand the books to

mean, when they say "liberally" construed, and that they are to be supported if there appears an intention, and the manner employed is within the fair and liberal exposition of that prescribed by the donor, and had the husband clearly evinced such intention by limiting in this deed that Kean should have, hold, and enjoy the estate, or words to that effect, that such appointment would have been sufficiently formal, and would have enabled him to have resisted the wife's power. But that, according to the clear design of the parties, he stood in no other condition than one with a general power of attorney to sell the lands in question to any person in his discretion, except such as could not hold them according to the laws of North Carolina.

RUFFIN and DANIEL, JJ., concurred.

HALL, J. It is said in Powell on Powers, page 8, "That powers simply collateral, are when a person is invested with a capacity of disposing of an interest in, or of destroying an interest in uses and trusts, in which he hath not, nor ever had any estate, first of creating such estate, as where *cestui que use* devised that his feoffees should sell his lands and died. Here the power to sell was merely collateral to the right of the land, for the feoffees take thereby no interest in the land, but are barely empowered to sell."

"Secondly, of destroying such estates as if there be a feoffment in fee by A., to divers uses, with power that if B. shall revoke them, the uses shall cease, for B. has no interest in the estate subjected to his power, nor can gain any by revoking or not revoking." For this he cites *Albany's case*, 1 Co. 3; and *Digges' case*, 1 Co. 174. The same doctrine is recognized in other books, and the same authorities relied upon, and it is said that a bare fine, feoffment, or common recovery will not destroy or extinguish them; but that powers appendant or powers in gross may be destroyed in either of those ways.

The argument of the plaintiff's counsel has thrown Haslen's power of appointment in the first-class of powers, and takes it for granted that he has not exercised it by his deed to Kean, and that consequently that deed cannot be considered as a release of it, or as affecting it in any respect whatever. The correctness of the principle laid down by Mr. Powell may be admitted; but it cannot be admitted that Haslen's power of appointment resembles either of the instances of collateral naked powers by him set forth in the passage above recited. Hargrave, in his notes on Co. Lit. 271, B. note 231, says that by

a general power of appointment is understood that kind of power which enables the party to appoint the estate to any person he thinks proper, and in this sense it is opposed to a particular or qualified power, which enables the party to appoint to, or among particular objects only. A general power enables the party to vest the whole fee in himself, or any other person; in fact, therefore, giving the person such a power is nearly the same as giving the absolute fee. The only difference is that it enables him to do, through the medium of a seisin previously created, that which if the fee had been actually limited to him, he might do by a conveyance of the land itself; so that, in both cases his power of alienation is of the same extent. Again, where there is a general power given to a person for such uses as he shall appoint, this gives him such a dominion over it as will subject it to his debts: 3 Atk. 656; 1 Atk. 456; 2 Atk. 172; 2 Ves. 10. In this case, could not the creditors of Haslen, if he had any, have subjected these lands to their debts?

It is stated in Co. Lit. 287, A.: "That if he that hath the power of revocation hath no present interest in the land, nor by the ceasor of the estate, shall have nothing, then his feoffment or fine, etc., of the land is no extinguishment of his power, because it is merely collateral to the land." Can it be said that upon the ceasor of the estate in Kean, Haslen may not have an interest in whom there is a general power to direct its course, either to himself or any other person he may think proper. As to powers merely collateral there is a very good reason given why they should not be destroyed or extinguished, etc., because, say Hargrave, Co. Lit. 342, note 298, referring to Co. Lit. 265: "Collateral powers, are not in the nature of rights or titles, and cannot, from their nature, be released. But that when powers are given, or reserved to any person, having an estate or interest either present or future in the land, the exercise of these powers is considered as advantageous to him, and there is no reason why he should not be allowed to depart with, or exclude himself from the benefit of them. But when they are given to strangers, they are intended for the benefit of some third person, and therefore the extinction of them is supposed to be injurious to some person intended to be benefited by them." In this case, who can be injured by Haslen's transferring his interest in either of the ways before specified? There are no third persons, as in the case of particular or qualified powers that can sustain any injury; as for instance, where the power of appointment is to be directed to be exercised in favor of the

children of a particular marriage, or particular specified friends of the person creating the powers. It would, therefore, seem that Haslen might transfer his interest under the power vested in him; for an interest he certainly had, and the deed from him to Kean, if it was not a strictly regular exercise of the power vested in him, ought to be considered as valid, and operating in some other way.

But it is said, that the deed to Kean operated as a delegation of power; and that it is a maxim, that "*Delegatus non potest delegare*," for this is cited 2 Atk. 88. It will be seen that that was the case of a particular qualified power, to be exercised in favor of particular persons, to wit: children of a particular marriage, where there was personal confidence and trust reposed. But it can have no analogy to the exercise of a general power, where there is neither confidence or trust in favor of third persons. But laying these considerations aside, I am of opinion that if there has not been a technical and formal exercise of the power of appointment by the deed from Haslen to Kean, by Haslen, there has been at least a substantial one. He states in that deed that he is acting in conformity to the power of appointment vested in him by the deed from Blount to Kean; and then directs, limits and appoints, that the lands shall be conveyed, etc., by the said Kean at his discretion, to any person qualified to hold, acquire and transfer lands. If, then, he had power to convey at pleasure to any person he chose, could he not elect to hold the lands himself? Suppose he had conveyed to some third person; could Haslen in the face of his own deed compel the purchaser to give up the lands? The effect of the deed to Kean from Haslen will not depend upon the after-conduct of Kean, whether he conveyed or not—if lands are devised to one "to give or to sell." These latter words show the deviser's intention that a fee shall pass; had they not been added, only a life estate would have vested in the devisee: Co. Lit. 9 b; 1 Wash. 266 [1 Am. Dec. 460]; 1 Wythe's Rep. 6, 88. In this case the legal estate was in Kean; and being there, and he being authorized by Haslen to sell to whom he pleased, I think completed his estate. But it is said, that if Haslen's deed to Kean had any effect, it could only be during the life of Haslen; that after his death, the power of appointment survived to Mrs. Haslen. I think that that power was only intended to vest in her, in case her husband did not exercise it at all; but if he has properly exercised the power of appointment, he has done it *in toto*.

DECISIONS
IN THE
COURT OF APPEALS
OF
KENTUCKY.

ALLEN v. TRIMBLE.

[4 BIRN, 21.]

DEED, PROOF OF EXECUTION.—If the subscribing witness cannot recollect his attestation, but recognises his handwriting, and declares it was his practice never to attest without hearing the acknowledgment of the parties, this is evidence to be left to the jury as to the execution of the deed.

DEED BY FORMER SHERIFF.—A deed made by a sheriff after his commission has expired, for land sold by him when in office, is valid and conveys a good title.

PLAINTIFF'S TITLE FAILING AS TO PART.—In an action of ejectment, where the plaintiff claims under demises from two different lessors for moieties of the premises, if the title under one of the lessors is not made out, yet the plaintiff may recover according to the title proved in the other lessor.

THE opinion states the case.

By Court, OWSLEY, J. This is an appeal from a judgment rendered in an action of ejectment, brought by the lessee of the appellees in the court below. The declaration contains two separate demises of undivided moieties of the land in contest, in one of which Robert Trimble, Jesse Bledsoe, Samuel R. Combs and John Holder are lessors of the plaintiff, and in the other John Hardwick is the lessor. The land seems to have been patented in the name of Mathew Walton and John Holder, and the title to one moiety whereof was claimed by the plaintiff in the court below, through his lessor Hardwick, by various intermediate transfers under Walton; and the title to the other moiety was claimed through the other lessors, by various intermediate transfers, and a sale under an execution against the estate of John Holder, deceased.

In the progress of the trial in the court below, the plaintiff there, to establish his lessor Hardwick's title, produced a deed purporting on its face to have been executed by Mathew Walton and John Holder, by his agent, Christopher Greenup, and to prove its execution, introduced James Garrard, one of the subscribing witnesses thereto, who said the signature of James Garrard to the deed was his handwriting, but he had no recollection of the execution of the deed by the parties thereto, and he could not say whether the name of Walton or that of Holder was written by Walton or Greenup, Holder's agent; but that it was always his practice to hear the acknowledgment of the parties to a deed before he subscribed his name as a witness, and that he did not believe he ever, in any instance, subscribed his name as a witness without hearing the acknowledgment of the parties to the execution of the deed. The defendants then moved the court to reject the deed from going in evidence to the jury, because its execution was not sufficiently proven; but their motion was overruled and the deed admitted as evidence. Whether, therefore, the court erred in not rejecting the deed, seems properly to form the first point of consideration.

That the execution of a deed may be proven by the oath of one witness only does not admit of a doubt, and although the witness whose evidence was given in the present case appears not to have retained a very vivid impression of the transaction, the circumstances detailed by him were certainly competent, and abundantly satisfactory to establish the execution of the deed by Walton. To require more to be proven would be not only prostrating the rules of evidence, but substituting a principle which in its consequences would inevitably tend to preclude all possible proof in relation to the execution of deeds of ancient date, for it cannot be supposed witnesses can at all times, and at the most distant periods, relate the particular circumstances of any occurrence whatever. But it was said in argument, that if the execution of the deed was sufficiently proven as to Walton, yet as there was no proof of Greenup's agency for Holder, the court erred in not instructing the jury to disregard the deed as to Holder's moiety. To this it need only be replied that the plaintiff in the ejectment claimed Walton's moiety only through his lessor, Hardwick; and as it was offered for the purpose only of establishing his right to that moiety, the court properly admitted it, without any instructions as to its efficacy. After all the evidence was gone through on the trial in the court below, that court, on the motion of the defendants there, refused to

instruct the jury, that if they should be satisfied from the evidence that the deed from Walton and Holder was duly executed by both the grantors therein, that in that case the legal title to the land therein mentioned passed from both grantors, and that Holder's interest in the land, which so passed by the deed, was not subject thereafter to be sold by execution, either against Holder or his representatives. And whether that court erred in withholding the instructions asked, presents the next question for determination.

Without deciding what the decision of that court should have been, had the evidence in any respect conduced to prove the execution of the deed by Holder, we are of opinion, as no such evidence was produced, the court properly withheld the instructions asked, for although either party in the progress of his cause, has a right to the instructions of the court on points of law applicable to a state of facts which the evidence conduces to prove, it is clear the court is not bound to give instructions on mere abstract propositions; and as the motion of the defendant partakes of that character, it was properly overruled. The plaintiff in the ejectment to establish a title to one moiety of the land in contest, in his lessors, Robert Trimble, etc., having produced in evidence a copy of the decree and the execution which issued thereon, and under which the sheriff of Bourbon sold the land; and also having produced the deed of conveyance executed by the sheriff after his term of office expired, the defendants in that court moved the court to instruct the jury, that the deed from the sheriff was not good and valid, and that it conveyed no legal title to the land in contest, but the court overruled their motion, and refused to give the instructions to the jury. In determining whether the court decided correctly in overruling this motion of the defendants, we are led to examine the validity of the deed executed by the sheriff, and in making this examination two questions arise: 1. Is land liable to be sold under an execution which issues upon a decree in equity? And if it is, secondly, has the sheriff who makes the sale authority to convey after his term of office expires?

As to the first question, it will not be denied but that by the letter of the act of 1792, which first subjected lands to the payment of debt, that sales under writs of *fieri facias* were confined to the satisfaction of judgments. According to the rules of chancery practice, writs of *fieri facias* could not regularly issue upon decrees. The legislature, however, aware of the mischiefs resulting to litigants in chancery, in consequence of writs of

feri facias not being allowable on decrees, to remedy the evil by an act of 1796, authorized the issuing of writs of *feri facias*, and other writs of execution upon decrees; and further provided that all process which might so issue, should have the same operation, and possess the same force, to all intents and purposes, as similar process issued upon judgments. Whatever, therefore, may have been the legal effect of the act of 1792, before the passage of the act of 1796, it is clear that not only according to the equity, but by the express letter of the latter of those acts, lands may be now taken and sold by writs of *feri facias*, in satisfaction of decrees in chancery. For as writs of *feri facias* before the passage of this act had the operation and possessed the power of selling lands in satisfaction of judgments, so since then similar writs have the operation and possess the power of selling lands in satisfaction of decrees. As then, land may be taken and sold in satisfaction of decrees in chancery, by sheriffs, under writs of *feri facias*, the question occurs, can the sheriff, making the sale, execute the deed of conveyance for the land sold after his term of office expires? We are of opinion he may. The provision of the act subjecting lands to the payment of debts, evidently require the deed of conveyance to be made by the sheriff who sells the land. That act, it is true, contains no express delegation of power to the sheriff to convey after his term of office expires, nor do we suppose such an express delegation of power was necessary to enable him to do so, for as the officer selling is required to convey, the execution of the deed of conveyance thereby forms a necessary part of the execution of the writ, and as according to the settled principles of the common law, he who begins the execution of a writ of *feri facias* must end it, so now under the statute, he who sells must finish the execution by conveying.

It was contended in the argument, that as this principle of the common law grew out of the sale of chattels under execution, it should not be made to apply to the sale of lands under the statute. To this it may be answered, that it was owing to the nature of the writ, and not the description of the property upon which it operated, that gave rise to the principle, and as the legislature, in subjecting lands to the payment of debts, have adopted that description of writ whose qualities gave rise to the principle, it is but fair to presume they intended the sheriff who might take land under a *feri facias*, should, according to this principle sell and convey the same, though his term of office should expire before the sale or conveyance.

That the legislature so intended is moreover further manifest by their failure to provide for the successor in office to complete the execution of a *fiery facias* which might be levied on lands and not sold by his predecessor, for with a knowledge of the term for which sheriffs hold their office, the legislature must have foreseen the probable occurrences of various cases where the sheriff, levying an execution on lands, could not make sale thereof during his continuance in office, and it cannot be supposed they intended to leave those cases unprovided for, and as they have not authorized the successor in such cases to complete the execution, the inference is irresistible, that they intended that principle of the common law to prevail, which makes it the duty of the sheriff who levies, to complete the execution of the writ.

But it was also urged in argument, that as the legislature has, since the passage of the act of 1792, provided for the conveyance of lands by the sheriff in office where the sale may have been made by a predecessor in office, they have thereby repealed any authority which the sheriff selling might otherwise have had under the former act. If we are correct in the construction which we have given to the act of 1792, the subsequent act cannot in any wise affect the case. That act contains no repealing clause, and neither the reasons which induced the legislature to enact it, nor the purposes of substantial justice, requires it should be construed to operate as a repeal of the act of 1792, or any of its provisions.

Upon the whole, we are of opinion the sheriff had authority to convey, and that the deed executed by him is valid, and transfers a good title. It remains, therefore, to decide whether the court below finally erred in refusing to instruct the jury upon the motion of the defendants in that court, that if they should find title to one moiety of the land in contest in one of the lessors of the plaintiff, and should find no title to the other moiety in the other lessors, that they should find for the defendants. We can perceive no objection to the decision of the court in overruling this motion. It is certainly the settled doctrine of the English courts, and has been repeatedly recognized by this court that a plaintiff in ejectment is not bound to show title to all the land claimed by his declaration, but may recover according to the extent of his title made out at the trial. According to this doctrine it would seem to follow that the plaintiff in the court below might recover upon the title of one of his lessors, unless he is prevented by the application of some other

principle. It is true, cases have occurred where, owing to the variance between the proof and the allegations in the declaration, a recovery has not been allowed, even according to the title; as for example, where the declaration contained a joint demise by two, and the evidence proved a title in one only. There, because the expression demised in the plural implicated an interest in both the lessors, it was held the proof did not correspond with the title alleged, and the plaintiff could not consequently recover.

But as the decision in the case just mentioned grew out of the artificial import of a joint demise, and turned on the variance between the proof and the allegation in the declaration, that case can have no application to the one before us, for in the present case the plaintiff has properly declared on separate demises; and although the jury might not be of opinion he had manifested a title in each of his lessors, there can be no substantial objection to his recovery according to the title which they should be of opinion he had proven.

The judgment of the court below must be affirmed with costs.

The doctrine of this case, as to the admissibility in evidence of the declarations of a subscribing witness, that he did not remember the attestation, but recognized his signature, and had made it a practice never to witness a deed without having heard it acknowledged, is approved in *Pate v. Joe*, 3 J. J. Marsh. 116, and the principle applied to the proof of the execution of a will.

In *Winslow v. Austin*, 5 J. J. Marsh. 409; *Coyles v. Higgins*, 1 Duvall, 7; *Evans v. Ashley*, 8 Mo. 183; and *People v. Boring*, 8 Cal. 409, the principal case is referred to as authoritative upon the question that the sheriff who commences an execution must complete it, and must execute the deed for the conveyance of property sold, although he may have gone out of office subsequent to the sale.

GREGORY v. BROWN.

[4 BERR, 28.]

LIABILITY FOR JUDICIAL ACTS.—A justice of the peace is not liable in an action at law for acts done judicially and within his jurisdiction, unless he has acted from impure or corrupt motives.

THE opinion states the case.

By Court, BOYLE, C. J. The defendant, in the capacity of a justice of the peace, gave judgment in favor of the plaintiff against one Thorp, for the costs of a suit by warrant; but having at a subsequent day so altered the judgment as to make

each party pay his own cost, the plaintiff being previously summoned to show cause against such alteration, he refused, on the application of the plaintiff, to issue an execution upon the first judgment. For that refusal the plaintiff brought an action upon the case, and the question now to be decided is, whether the action is maintainable or not?

Whether a magistrate, after he has once pronounced a judgment, can at a subsequent day grant a rehearing, and suspend or alter such judgment, is a question about which we are aware there has been much difference of opinion in the country amongst men of legal information, as well as amongst the magistrates themselves. This is a point, however, we do not in this case deem material to be decided; for be it as it may, we are of opinion the action cannot be maintained. There can be no question that the subject-matter was within the jurisdiction of the magistrate; and where a magistrate acts judicially upon a subject within his jurisdiction, though he should act illegally or erroneously, he cannot be made liable for any damage sustained by his conduct, unless he has acted from impure or corrupt motives. And in this case the state of the pleadings repels any conclusion of that sort. The court below therefore decided correctly for the defendant.

Judgment affirmed with costs.

See *Grumon v. Raymond*, 6 Am. Dec. 200, and an examination of the subject of judicial liability in the note to *Yates v. Lansing*, Id. 203.

TABB v. HARRIS.

[4 Brea, 29.]

PRIORITY OF EXECUTIONS.—Where several executions in favor of different plaintiffs, and against the same defendant, have been placed in the hands of a sheriff, it is his duty to satisfy that execution which was first received.

IDEM—LIEN OF EXECUTION.—But a former execution not levied, and returned, does not create a lien, to the exclusion of a second judgment-creditor, who delivers his execution to the sheriff, in whose hands there was no other execution against the debtor.

THE opinion states the case.

By Court, OWSELY, J. The sheriff of Madison county, having in his possession two writs of *feri facias* against the estate of Higeson Grubbs, one of which was in favor of the plaintiff, Tabb, and bore date twentieth April, 1818, and was delivered

to the sheriff the same date. The other was in favor of the defendant, Harris, and bore date the twenty-eighth of April, 1813, and was delivered to the sheriff the twenty-ninth of April, 1813, took such of the estate of Grubbs as could be found, and made sale thereof; but the proceeds of the sale not being sufficient to satisfy both executions, and each of the plaintiffs in the execution claiming the money, the sheriff brought it into court; and both Tabb and Harris appeared, and waived all exceptions to the mode of proceeding, and desired the decision of the court to whom the money should be paid. And it further appearing to the court that Harris, previously to the date of the *feri facias* which issued in favor of Tabb, had other writs of *feri facias* issued upon his judgment, which had also prior to that time been returned not satisfied, in consequence of no property being found, the court were of opinion that the execution of Harris was entitled to the preference, and made their determination accordingly. To reverse this decision of that court Tabb has prosecuted this writ of error with *supersedeas*.

Before we examine the correctness of the decision of the court below, it may not be improper to remark that there exist no circumstances in this case from which the slightest imputation of fraud can attach to either of the parties; and although the defendant Harris had no execution in the hands of the sheriff when that of the plaintiff Tabb was delivered, yet he appears to have been honestly endeavoring to coerce the collection of his demand. The question, therefore, which the parties appear to have intended to make, and which the record now presents for our determination, seems to be: should a sheriff, regardless of all prior executions not then in hand, satisfy that first which is in hand when the levy is made, and which came to his hands prior to any other then in his possession?

The decision of the court below must have been made upon the supposition that the first execution which issued in favor of Harris, created a lien upon the estate of Grubbs, not only as against Grubbs and purchasers under him, but as respects all other plaintiffs; and that that lien was preserved and continued by the various intermediate executions which had been issued and returned in favor of Harris. This position cannot, however, either according to the principles of the common law or under the statute concerning executions, be maintained. The common law, regardful of the interests of plaintiffs, and to preserve it against the fraudulent acts of defendants in alienating their goods, made writs of execution, have relation to their *teste*,

and bind the estate of defendants from that time; so that if they should sell their goods thereafter, they might be taken in execution in whose hands soever they might come. But as between plaintiffs in execution, the common law knew no partiality, and created no lien in favor of one in prejudice to that of another. It is true sheriffs were bound by the duties of their office to maintain the utmost impartiality between plaintiffs; and as the writ of *fi. fa.* formed a sufficient authority for him to act, it became his duty, when several should be received in favor of different plaintiffs against the estate of the same defendant, to evince that impartiality by satisfying that writ first which had been first received; and for a failure to do so, the sheriff was held guilty of a breach of his official duty, and made liable to the action of the plaintiff whose execution had been first received.

This rule of the common law requiring sheriffs to satisfy that execution first which first came to hand was not produced by any lien which the law created in favor of the first execution, but as being better calculated to prevent any improper management between the sheriff and other creditors, to the prejudice of the plaintiff in the first execution, and as tending more certainly to preserve good faith and impartiality on the part of the officer. The application of the rule must, however, be confined to those executions in the hands of the sheriff when the levy is made, for as the sheriff derives his authority from the writ then in hand, it would be preposterous in the extreme to make it his duty to apply the proceeds of the sale to an execution not then in hand, and which from the lapse of time since in hand, has become entirely extinct.

If, then, we are correct in supposing that no lien existed at the common law on the goods of a defendant, in favor of one plaintiff in execution in exclusion to another, it becomes proper that we should inquire whether there exists any statutory provision changing the common law in this respect? The only statute which has any bearing on this question is that of 1796, concerning executions. The eighth section of that statute: 1 Litt. 540, provides that no writ of *fi. facias*, or other writ of execution shall bind the property of the goods, etc., against which such writ issued, but from the time such writ shall be delivered to the sheriff or other officer, to be executed. It is obvious from the phraseology of this section of the statute that the legislature did not intend writs of *fi. facias* which might thereafter issue, should have a more extensive binding efficacy than they

had at common law, but that the object in passing it was to prevent the mischief which frequently resulted to purchasers under that rule of the common law giving writs of execution relation to their *teste*, and to prevent those writs from binding the estate until they should be actually delivered to the sheriff. The English courts in giving an exposition to their statute similar in its provisions to that of ours, have uniformly considered it as operating only to preclude the defendant from so disposing of his estate as to prevent it from being taken in execution. But no case, either before or since the statute, can be found where it has ever been held that as between different plaintiffs, a lien has been created by the delivery of the execution. The contrary is, however, strongly to be inferred from the various adjudged cases since the passage of the English statute. See Salk. 320; Ld. Raym. 251; 6 Bac. Ab., tit. Sheriff, letter N.

As, therefore, there was no lien preserved by the executions which first issued in favor of Harris, and which were not in hand when Tabb's was received, that of Tabb's ought to have been first satisfied; and the court consequently erred in not so deciding.

The decree of that court must be reversed, with costs.

As to priority of judgments and executions in favor of different creditors against the same debtor, see *Adams v. Dyer*, 5 Am. Dec. 344, and cases cited in note thereto.

BUNTON v. WORLEY.

[4 BING. 38.]

PRIVILEGED COMMUNICATIONS—JUDICIAL PROCEEDING.—Words spoken before a justice of the peace, on an application for a warrant for felony, are not actionable if spoken in good faith and for the purpose of instituting proceedings.

QUESTIONS FOR JURY IN SLANDER.—The court should instruct the jury as to the law, and leave to them the *animus* with which the words charged to be slanderous were spoken.

The opinion states the case.

By Court, LOGAN, J. This is an action of slander, for words charging the defendant with felony. The words were spoken in part before a justice of the peace on the application for a warrant to arrest the defendant on said charge. Upon the trial, Bunton, the defendant in that court, by his counsel, moved the court to exclude any evidence which went to detail state-

ments made to the justice in relation to the charge, at the time of the application for the warrant, and also moved for instructions to the jury, that if they were of opinion from the evidence that the words spoken before the justice were spoken in the course of the application for a warrant to prosecute with good faith the plaintiff, and not for the purpose of slandering him, the defendant was not liable to the action for words thus spoken. Each of these motions the court overruled. To which opinions the defendant below filed exceptions, and assigns for error the said opinions of the court.

The first exception relates to the competency of the testimony only. The evidence was clearly admissible. Without admitting it, the words spoken, the manner of speaking them, whether in the course of the prosecution before the justice, or maliciously spoken, could not be known; and as the defendant seems to have spoken them at different times, and in a manner not free from the imputation of malice, the gist and essence of slander, it formed the proper subject for the consideration of the jury, and the court therefore properly overruled the motion.

The second application, however, was of a different character; it called on the court for instructions upon a question of law, whether words are actionable, if spoken before a magistrate in the course of a prosecution for felony, or as preparatory thereto. It was the province of the jury to decide upon the fact whether the words were so spoken or not; but it was the duty of the court to determine whether, if thus spoken, the law held the speaker of them liable to this action. Malice is the gist of the action. But malice is not within the implication of law, in a prosecution in felony, which can only be instituted upon the information or words of some one.

If an action would lie for words uttered before a justice, when applied to in good faith for a warrant to apprehend the felon, the culprit might escape for want of prosecution, for but few would subject themselves to the action of slander by endeavoring to bring to justice offenders: 6 Bac. Abr. 226, title Slander. And on the other hand, a mere pretense under the cloak of a prosecution, to obtain the greater latitude for defamation free from responsibility, must be guarded against. This must rest much upon the sound discretion of the jury, who are the triers of the evidence and the fact, under the direction and instructions of the court upon the law of the case. It is deemed unnecessary to examine the point made in the third exception.

The judgment of the circuit court must be reversed upon the second question made, with costs, and the cause remanded for a new trial.

See *Hume v. Arrasmith*, 4 Am. Dec. 626, as to the province of the court in an action for slander; *Jarvis v. Hatheway*, 3 Id. 473, as to malice being a question for the determination of the jury.

COMMONWEALTH v. MCGOWAN.

[4 Buss. 62.]

NO TIME AGAINST COMMONWEALTH.—The statute of limitations does not run against the commonwealth.

WHEN STATUTE DOES NOT RUN.—The statute does not run until there is some one in whom the right of action is indubitably vested.

STATUTE AFFECTS WHAT.—The statute bars the remedy but not the right.

THE opinion states the case.

By Court, LOGAN, J. Thomas Dobyns, who had been the sheriff of Mason county, having, after the expiration of his term of service, exercised the power and duties incident to the office, in selling land and collecting money due to the commonwealth for the arrearage of taxes by virtue of a delinquent list transmitted through mistake to him by the auditor of public accounts in the year 1800 and 1801, the legislature passed laws for the relief of those who had been induced innocently to make payments to said Dobyns, under a belief that he was legally authorized to collect the same, by directing a credit in favor of such persons for any taxes due from them to the commonwealth. By the provision thus made, certain requisites were demanded as the evidence of right to entitle any to the benefit of the law upon the oath of the applicant. All of which seemed to have been complied with on the part of McGowan, who as the deputy sheriff of Montgomery county, received considerable credits in the settlement of the revenue from that county, on account of payments appearing to have been made to Dobyns for certain lands stated to have been sold by him for the taxes as aforesaid. These payments appearing to the legislature afterwards to be groundless and a base fraud practiced upon the government by McGowan and Dobyns, in the year 1809 they passed an act directing the attorneys for the commonwealth in certain counties to institute suits for the recovery of said moneys back from McGowan, etc. An action on the case was accordingly brought in the same year against McGowan, to

which he pleaded the general issue of limitations. To the first plea there was a joinder, to the second a demurrer, which the court below overruled and determined that the action was barred by the statute of limitations. So that the only question for the consideration of this court is as to the correctness of that decision.

By the statute of limitations "all actions of account and upon the case," with the exception of certain cases, not embracing the present case, are required to be brought within five years next after the cause of action accrues. Is the commonwealth concluded by this statute? The maxim of the common law is that *nullum tempus occurrit regi*. Besides it is a settled principle that the king is not bound by a statute without being expressly named. How far these principles are applicable to the commonwealth is a question proper for examination. Prerogatives belonging to the king, relating merely to his person, are clearly inapplicable to this government or its officers; but general principles of law, founded upon considerations of public good, which apply to the king as the head of the kingdom, and which remain unrepealed by statute, are certainly entitled to respect if not to the weight of authority. The same reason and public policy which excluded the operation of the statute of limitations in England, containing provisions similar to that of our own, will be found not less applicable as relates to our own government. If time in that country was so necessarily devoted to public purposes as to prevent the running of the statute to the prejudice of the crown and public utility, so in this it may be equally important to the commonwealth, and for want of vigilance and attention in officers of the government, not less necessary to the public good.

By the common law the statute of limitations did not run against the king, and the common law being adopted as the law of this country where it applies, and has not been repealed by statute, which in this respect not having been done, it would seem to follow, therefore, that the principles in relation to public good and general convenience are to be recognized as law as well as those maxims regulating private rights. If we have a statute using general terms without exempting the commonwealth, so had that government from which our general system of jurisprudence has been drawn; and as general provisions regulating private rights, without naming those belonging to the government or the king, its head, did not apply to him, so here, in regulating the private rights of our citizens, it

seems a just presumption that the interest of the commonwealth was not intended to be likewise embraced. The same principle has been recognized by the court of appeals of Virginia as applicable to that commonwealth: 1 Hen. 85; 4 Id. 57.

But, again, it may be questioned whether the running of the statute of limitations can be admitted in the present case upon another ground. Although the right existed in the commonwealth against the defendant, to the money which had been thus improperly and fraudulently drawn from her, yet it was not until 1809 that the remedy to recover it was especially given. By that act, such a remedy is provided. The right existed before, but without such special remedy. Upon no officer was the power of instituting and carrying on a suit enjoined by law. There was no one in whom the right of action indubitably vested capable of suing, and until there was some person in whom the right clearly vested, there was none against whom the statute was to run: 4 Bac. Abr. 479; *Beauchamp v. Mudd*, 2 Bibb, 537. For although the right was in the commonwealth, it lay dormant, and must necessarily do so, until some active agent was created and recognized by law as having the right to sue.

But if the statute of limitations operates only upon the remedy in personal actions, and not upon the right, as was virtually determined in the case of *Graves v. Graves*, 2 Bibb, 207 [4 Am. Dec. 697], it would follow as a necessary consequence that the act of 1809 would operate as a repeal or suspension of that statute, in relation to the present case. The remedy only being barred, the legislature were competent to remove the obstacle by furnishing a new remedy; and whether this is done by a repeal of the statute, or by giving a new law, posterior, and consequently paramount, to the old one, cannot be material in testing their power to do so.

Upon either of the several grounds, therefore, we think the circuit court erred, and the judgment must be reversed, with costs, and the cause remanded for further proceedings.

PAYNE v. RODDEN.

[4 Bibb, 204.]

PLEDGING WARRANTY OF TITLE.—A declaration alleging a failure of title in the vendor of a chattel, although it sets out no express warranty of the title, will be good after verdict, upon the ground of the implied warranty.

THE opinion states the case.

By Court, OWSELY, J. This writ of error is brought to reverse a judgment recovered by the present defendant in an action prosecuted by him against the plaintiff in the court below. The judgment was obtained upon a verdict, after a fair trial upon the merits, and as the assignment of errors questions the sufficiency of the declaration, it becomes necessary only to inquire whether it contains substantially a good cause of action. The declaration, although very informal, may be said to set forth, as the grounds of the action in substance, "that in consideration of ninety-three dollars paid by the present defendant to the plaintiff, he, the said plaintiff, sold and delivered as his own property, to the defendant a certain bay horse, but that the said horse was not in fact the property of the plaintiff, but the property of one Allen and Williams." As the plaintiff is not alleged to have sold the horse, knowing him not to be his own, the declaration cannot be supposed to contain any cause of action on account of a fraud in the sale; but if it is maintainable upon any grounds, it must be upon the principle of an implied warranty of the title upon the sale of the horse. That the declaration contains such allegations from which the law implies a warranty, we apprehend there can be no doubt, for although a seller is not presumed to undertake for the soundness of goods which he sells, yet with respect to a chattel in the possession of the vendor, it is settled by a current of authority, that there is an implied warranty of title: Cro. Jac. 474, 197; Carth. 90; 2 Comyns on Contracts, 263.

This implied warranty is not of the character supposed in argument which requires a recovery of the goods by the right owners, before an action can be maintained by the purchaser, but is in the nature of an implied undertaking on the part of the seller, that the commodity he sells is his own, and that in an action upon such an undertaking it is a sufficient breach to allege that the property belongs to some other. Notwithstanding, the cause of action must be considered as being charged upon the implied warranty of title, although the declaration contains no express promise or undertaking to that effect, we suppose that after verdict an objection for that cause ought not to prevail, for although strictly speaking it may be more correct to allege expressly an undertaking by the defendant, yet after verdict, where, as in this case, all those facts are stated from which the promise or undertaking will be implied, the judgment

should not be reversed because the *assumpsit* may not have been expressly alleged: 1 Chitty, 299; 1 Salk. 129; Carth. 509.

Judgment affirmed with costs and damages.

As to warranty of title implied on a sale of chattels, see note to *Emerson v. Brigham*, 6 Am. Dec. 113.

PIKE v. THOMAS.

[4 BIRE, 486.]

CONSTRUCTION OF DEFEASANCE.—One agreement may operate as a defeasance of another, but whether a second agreement should operate to defeat a former one, is matter of law depending upon the construction of the instrument itself; and a plea founded upon a parol averment that it was so intended is insufficient.

INDEPENDENT COVENANTS, CONSIDERATION.—In independent covenants, the reciprocal covenants themselves, and not their performance, is the consideration.

CONTRACTS, RESTRAINT OF TRADE.—An agreement to restrain a party from pursuing his trade in any part of the country, is void, as against public policy; but it seems that a contract founded on a valuable consideration not to carry on business in a particular place or particular section of the country, leaving open the major portion of the country for the carrying on of the business, is not liable to the same objection.

THE case appears from the opinion.

By Court, BOYLE, C. J. This was an action of covenant upon articles of agreement between the plaintiff and defendant, the object of which was to erect and carry on a wool-carding machine in partnership. Various mutual covenants are made by the parties. Among those on the part of the defendant is a covenant not to erect, or to have any hand in erecting, a wool-carding machine within twenty miles of the plaintiff's machines then in operation, without paying to the plaintiff two hundred dollars a year during the operation of such machine. The action was brought for a breach of this covenant only. The defendant pleaded: 1. That the plaintiff had not kept and performed the covenants on his part; 2. That on the next day after the execution of the articles of agreement on which suit was brought, a new covenant of partnership for erecting and carrying on a wool-carding machine was entered into between the plaintiff and defendant and one Mitchell, whereby the former articles between the plaintiff and defendant were intended to be and were annulled and rescinded; 3. That the erection of the wool-carding machine, and the covenants on the part of the plaintiff in

relation thereto, were the only consideration of the covenant on the part of the defendant for the breach of which the action is brought, and that the said machine was never erected, nor did the plaintiff perform the covenants to be performed on his part in relation thereto, and so the consideration of said covenant has failed, and the covenant is against law and void; 4. The fourth plea is in substance the same as the third; 5. The fifth denies that there was any reasonable or valuable consideration for the covenant for the breach of which suit is brought; 6. The sixth alleges that the covenant was in restraint of the defendant's lawful trade, and therefore against law and void; 7. The seventh alleges that the plaintiff did not furnish a good wool-carding machine and tucker, of the same quality of those in Flemingsburgh, by the first of May next ensuing the date of said articles, and set them to running, as he, the said plaintiff, by said articles had covenanted to do.

The first plea was rejected by the court below. To the second, there was a replication and joinder. To each of the others there was a replication, and to each replication a demurrer, upon which the court below gave judgment for the defendant, and the plaintiff has appealed to this court. We have not thought it necessary to recite the substance of the replications, because we are not of opinion that either of the pleas is sufficient to preclude the plaintiff from a recovery, and as the demurrers to the replications brought the whole pleadings before the court, the judgment should have been given for the plaintiff, on the ground of the insufficiency of the pleas, without regard to the matter of the replications. As to the first plea, it is sufficient to remark that it could only have been sustained on the ground that the covenants on the part of the plaintiff were precedent to those on the part of the defendant, and the performance of the latter made to depend upon the performance of the former. But this is plainly not the case; for according to the terms of the covenants, they are clearly independent, for a breach of which, on either side, the other party may have his action. But a failure of performance on the one side is no bar to an action for a non-performance on the other.

As to the second plea, there is no doubt but that the parties might have defeated or annulled the first agreement by the second. But to have done so, they should have made the latter purport on its face to be a defeasance of the former, for whether it should operate as a defeasance or not, must be a matter of law, depending upon the construction of the instrument itself;

and as there is nothing upon the face of the latter agreement in this case which purports to be an annulment or defeasance of the former, a parol averment that it was so intended is inadmissible, and the plea founded upon such averment is insufficient. The third and fourth pleas turn essentially upon the same principles as the first, plainly presupposing that the performance of the covenants on the part of the plaintiff was the consideration of the covenants on the part of the defendant; whereas it is the covenants themselves, and not their performance, which is on each side the consideration of those on the other; and consequently there can be no failure of consideration, unless there was a failure or destruction of the covenants themselves. The fifth plea being a mere denial of any consideration for the covenant declared on, is inadmissible, inasmuch as the articles of agreement show a sufficient consideration in the covenants it contains on the part of the plaintiff.

The sixth plea presents a question which must depend upon the law applicable to the nature of the covenant for the breach of which suit is brought. An agreement to restrain a party from pursuing his trade anywhere in the country, no doubt would be void; for a general restraint of that kind would be opposed to good policy. But an agreement not to exercise his trade in a particular place or a particular section of the country, leaving open to him the major part of the country for the free use of his trade, does not seem liable to the like objection; and such agreements, when made for a sufficient consideration, have been often solemnly adjudged good and binding: *Chesman v. Nainby*, 2 Str. 789; *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 Bac. Abr. 645-646.

The seventh plea depending upon the question whether the covenants on each side were dependent or not on those of the other side, has in effect been already decided, and the principles involved in it need not be again mentioned. The judgment must therefore be reversed, and the cause remanded for new proceedings to be had, not inconsistent with the foregoing opinion.

CONTRACTS IN RESTRAINT OF TRADE.—Whether a contract in restraint of trade shall be valid or not, depends upon three considerations: 1. If the restraint be partial; 2. If founded on a good consideration; and, 3. If it be reasonable and not oppressive: *Thomas v. Mills*, 3 Ohio St. 275; *Bremer v. Marshall*, 4 Green Ch. 537; *Wright v. Ryder*, 36 Cal. 357; *Holbrook v. Waters*, 9 How. Pr. 353; *Dunlop v. Gregory*, 10 N. Y. 241; *Chappel v. Brockway*, 21 Wend. 157; *Holmes v. Martin*, 10 Ga. 503; 1 Smith's L. Cas. 724; 2 Parsons on Contracts, 753.

GENERAL RESTRAINT.—A contract in general restraint of trade, as not to carry on a certain business in a state or country, is void: *Nobles v. Bates*, 7 Cow. 307; *Chappel v. Brockway*, 21 Wend. 157. So a contract not to carry on a business in a state: *Wright v. Ryder*, 36 Cal. 357; *More v. Bonnet*, 40 Id. 251. A covenant not to set up, or exercise, or carry on the trade or business of manufacturing shoe-cutters, in the state of Massachusetts, was held unreasonable: *Taylor v. Blanchard*, 13 Allen, 370; and not to carry on business in the state of New York west of Albany: *Lawrence v. Kidder*, 10 Barb. 641. In *Whitney v. Slayton*, 40 Me. 224, a contract not to engage in the business of iron casting within sixty miles of Calais, for the term of ten years, was upheld. So was an agreement by a physician not to practice in a particular town, and the vicinity thereof: *Warfield v. Booth*, 33 Md. 63; *Hoyt v. Holly*, 39 Conn. 326. A contract by an apothecary not to set up business within twenty miles of A. was held legal: *Hayward v. Young*, 2 Chit. 407; see *Davis v. Mason*, 5 T. R. 118 to the same effect. So a covenant not to practice medicine within twelve miles of a certain place was sustained; *McClurg's Appeal*, 58 Pa. St. 51; *S. P. Butler v. Burleson*, 16 Vt. 176.

In *Morse Twist etc. Co. v. Morse*, 103 Mass. 72, the defendant sold to the plaintiffs two patents issued to him for improvements in twist drills and collets, covenanting at the same time to transfer to the purchasers all his subsequent improvements in the process of manufacture, and that he would at no time aid, assist or encourage in any manner any competition against him. Afterward he removed to another state, and engaged in the manufacture of other twist drills and collets, selling them in the same market in competition with plaintiffs. In a suit to restrain defendant from violating his covenant, it was held that as the business was not local in its character, and the restraint not greater than the interest of the plaintiffs required, the contract was valid. In *Hubbard v. Miller*, 27 Mich. 15, S. C. 15 Am. Rep. 153, the defendant sold the complainant his business of well-driving at G., and in consideration of the sale agreed "not to keep well-drivers' tools or fixtures, and not to engage in the business of well-driving after" that date. It was held that the agreement should be construed to impose a restraint upon the defendant within such limits as the business there located would naturally and reasonably embrace, and not such a general and unlimited restraint as to be void.

It is said in *Callahan v. Donnelly*, 45 Cal. 152, that a contract in restraint of trade, must designate the space within which it is to operate, and must not be unreasonably extended. Such contracts, when upheld, are only in cases where the parties have restricted the territory in which they are to operate, and where the court, in considering the nature of the business in connection with the territorial limits assigned, is of opinion that the designated limits are not unreasonable in extent. So, that whether a contract is in restraint of trade or not, is a question of law, to be determined by the court, and not a question for the jury: *Mallan v. May*, 11 M. & W. 653; *Kellogg v. Larkin*, 3 Chand. 133; *Horner v. Graves*, 7 Bing. 743.

That restrictions, however unlimited, will be upheld if not unreasonable or unnecessary, having regard to the subject-matter, is shown in a recent English case: *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345. Upon the formation of a company for the purchase and working of a process of manufacture introduced into England from America, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they, to the best of their powers, allow to be carried on by others in any part of Europe any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory of the vendors, and will not communicate to any person or persons, the means or

processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased. It was held that the restriction was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchaser, and was capable of being enforced against the vendors.

Illustrations of the rule that partial restraints are not void appear in *Pierce v. Fuller*, 5 Am. Dec. 102; *Perkins v. Lyman*, 6 Id. 158. In *Palmer v. Stebbins*, 3 Pick. 188, it was held that a bond conditioned that the obligor should give the obligee all the freighting of the obligor's goods up and down the Connecticut, at the customary price, to be paid in goods at the usual price, and that he should not encourage any other boatman to compete with the obligee in the business of boating, was not void as being in restraint of trade, and was founded on a good consideration. Addison on Contr. 100, very accurately states the law on this subject where he says: "Contracts restraining the exercise of a trade or profession in a particular locality are good and valid when there is a fair and reasonable ground for the restriction, as in the case of the sale of the good will of a trade or business carried on in a particular locality, where the vendor covenants or agrees not to carry on the same business in the same place, in opposition to the purchaser."

REASONABLENESS OF RESTRAINT.—In estimating the reasonableness of a contract not to exercise a trade or profession within a particular district, the populousness of the district, it seems, is not to be taken into account: *Malins v. May*, 11 M. & W. 653. In *Horner v. Graves*, 7 Bing. 743, an agreement that the defendant, a surgeon-dentist, would abstain from practicing within one hundred miles of York, was held void on the ground that the distance rendered it unreasonable. On the sale of a business the vendor agreed that he would not exercise nor carry on the trade, either in his own name or that of any other person or persons in a particular town. It was held that his managing the business of another person in the same trade at a weekly salary was not a breach of the agreement: *Allen v. Taylor*, 24 L. T. (N. S.) 249.

In *Harkinson's Appeal*, 78 Pa. St. 196, a woman sold a bakery, and covenanted that she would not "engage in the same business directly, or indirectly," in the same place, for ten years. Within that time, she established her son in the same business within the limits of the same place, advancing him money, as she had done to her other children, in their business. It was found as a fact, that the business was carried on in good faith by the son, and not by the mother, and no actual damage to the plaintiff was shown. It was held that the plaintiff was not entitled to an injunction to restrain the mother from permitting or aiding her son to carry on the business.

The restraint, to be lawful, must therefore be reasonable, and confined within reasonable limits. "Where it is larger and wider than the protection of the party with whom the contract is made can possibly require," said the court, in *Hitchcock v. Coker*, 6 Ad. & El. 454, "such restraint must be considered as unreasonable in law, and the contract which would enforce it, must be therefore void.

CONSIDERATION.—Whether the consideration for the restraint is adequate or not, is a question which a court will not examine. It is sufficient that the contract shows on its face a legal and valuable consideration; but whether adequate or inadequate to the restraint imposed, must be determined by the parties themselves, upon their own view of all the circumstances attending the particular transaction. If it were otherwise, it would be the court, and

not the parties, that would make the contract. All that the court is required to do, in passing upon the validity of the contract, is to determine whether the restraint is reasonable and consistent with law, and whether there be a legal consideration to support it: *Hitchcock v. Coker*, 6 Ad. & El. 439; *Araker v. March*, Id. 966; *Leighton v. Wales*, 3 M. & W. 551; *Pilbington v. Scott*, 15 Id. 657; *Guerand v. Dandelest*, 32 Md. 561.

GUTHRIE v. WICKLIFFS.

[4 Buss, 541.]

INTEREST WHEN ALLOWED.—In an action on a covenant to pay property, it is discretionary with the jury to allow interest on the value of the property or not; and if the court instruct the jury to find damages to the full amount of interest, it will be error.

THE opinion states the case.

By Court, OWSLEY, J. In an action of covenant upon an agreement to pay property, the appellees recovered in the circuit court judgment for upwards of eighteen hundred dollars, damages and costs; and the cause having been brought to this court by appeal, that judgment was affirmed, with ten per cent. damages and costs. To be relieved against the judgment, the appellants then exhibited their bill in equity, with injunction; and upon a hearing the injunction was also dissolved, with damages. Subsequent to this, the appellees brought an action of debt upon the judgment first obtained, and again recovered the amount thereof, together with damages equivalent to the legal rate of interest upon the first judgment, from the time it was obtained until the latter trial. During the latter trial the jury were instructed by the court that they were bound, regardless of what they might think the justice of the case, to give damages to the full amount of interest on the first judgment; and whether those instructions were properly given is the main inquiry presented for the consideration of this court. As the agreement upon which the action of covenant was brought contains no stipulation for the payment of interest, it is perfectly clear that upon no principle of the common law can it bear interest. It is true, according to the ancient course of the common law, although the value of the thing covenanted to be performed usually regulated the amount of damages, the jury in an action sounding altogether in damages, did in some instances exceed that measure; but they did so, not because the law subjected the covenantor to the payment of interest, but in the exercise of

a sound discretion with which they were invested, regulated by what, under the peculiar circumstances of the case, they might think just.

There is not to be found in any statute either an inhibition against the exercise of this discretionary power of the jury, or a provision giving interest upon a covenant to pay property. Statutes have, it is true, from time to time been enacted regulating the rate of interest which the contracting parties might lawfully receive, and of late allowing, in a described class of contracts, a continued accumulation of interest. But as none of these statutes make contracts for the payment of property bear interest without an express agreement of the parties, upon no fair principle can they be construed to have taken from juries any discretion which they may have previously possessed in assessing damages in such cases. Since the enactment of those statutes, juries have, it will be admitted, very properly, in ascertaining the amount of damages for a breach of covenant, been generally governed by the value of the property stipulated for and interest thereon; but as this rule has not been adopted under any positive statutory provision, but grown out of what is usually just between the parties, it ought not to be regarded as imperative in all cases, but departed from whenever under any circumstances the demands of justice require it. If, then, we are correct in supposing the jury might or might not, in the action of covenant, according to their opinion of the justice of the case, either have given damages equivalent to the value of the property with or without interest, it follows the judgment, as it was obtained before the passage of the act of 1811, 4 Litt. 394, giving interest upon judgments, does not bear interest.

That judgment, when obtained, it is true, gave the defendants in error, in whose favor it was rendered, a good cause to maintain thereon an action of debt, and in such an action it will be admitted damages are recoverable. But as the judgment did not upon legal principles bear interest, the amount of damages to be recovered, as in the action of covenant, must be within the discretion of the jury. Cases no doubt may occur where it would be proper for the jury in debt upon a judgment to give for the detention of the debt damages equivalent to the legal rate of interest; but it is also clear that cases may occur (and very probably the jury may think the present one of that character) where it would be highly unjust for the jury to give more than nominal damages.

Because, therefore, the jury were not permitted to exercise their discretion, under the circumstances of the case, in either giving or withholding damages equal to the rate of interest, the judgment must be reversed with costs, the cause remanded to the court below, and a new trial had, not inconsistent with this opinion.

For an examination of the subject of interest, see the note to *Selleck v. French*, 6 Am. Dec. 185.

INDEX.

ACTION.

ACTION FOR MONEY SUBSCRIBED.—Where several persons agreed in writing to lend, for the establishment of a newspaper, the sums subscribed by them, the same to be paid to one of their number as agent, such agent may maintain an action against those subscribers who refuse to pay, to reimburse himself for money advanced upon the faith of the subscriptions. *Homes v. Dana*, 55.

ANCIENT LIGHTS.

See EASEMENTS, 1.

ARREST.

DWELLING-HOUSE PROTECTS WHOM.—A dwelling-house is a protection from arrest on civil process not only to the occupant, his children and domestic servants, but also to his permanent boarders or lodgers. *Oystead v. Shed*, 172.

ASSETS.

1. **EQUITABLE.**—Surplus money arising from the sale of mortgaged premises is considered as part of the real estate of the deceased mortgagor, and goes to the heirs and not to the administrator; and where the heirs are before the court, such surplus will be treated as equitable assets in their hands and distributed *pro rata* among the creditors. *Moses v. Murphree*, 478.
2. **EQUITY OF REDEMPTION AS.**—Where the creditors have a legal remedy against an equity of redemption, it is questionable whether, before sale, it could be deemed equitable assets. *Id.*
3. **DISPOSITION IN EQUITY.**—Courts of equity will follow the rules of law in disposing of legal assets, but will distribute equitable assets *pari passu* among all the creditors. *Id.*

ATTACHMENT.

See SHERIFF, 1.

BANKRUPTCY.

1. **DISCHARGE UNDER FOREIGN BANKRUPT LAW.**—A discharge under a bankrupt law of the state in which the contract was made, and of which the debtor was a citizen, is a good bar to an action upon such contract in the state in which the creditor resides. *Blanchard v. Russell*, 106.
2. **BANKRUPTCY AND INSOLVENCY DISTINGUISHED.**—Insolvent laws are optional; bankrupt laws are compulsory; insolvent laws operate equally upon all men, and have for their object only the liberation of the creditor from imprisonment; bankrupt laws respect only merchants and traders and exonerate them from their debts. *Vanuxem v. Hazelhurst*, 582.
3. **STATE BANKRUPT LAWS.**—Congress has the exclusive power of making laws upon the subject of bankruptcy, and any state law which discharges a debtor from the payment of his debt is void. *Id.*
4. **FOREIGN BANKRUPT LAWS—DISCHARGE.**—A discharge under the bankrupt laws of one state is not a bar to an action on a debt contracted in another state. *Id.*
5. **DEBTS NOT BARRED BY DISCHARGE.**—Where a debtor, upon the eve of bankruptcy, promises to pay the debt when he shall be able, his certificate of discharge will be no bar to an action on the promise, such promise being conditional, and the debt arising from it not provable under the debtor's commission. *Kingston v. Wharton*, 638.

BARRATRY.

WHAT IS.—To constitute barratry on the part of the master of a ship, the act must be either fraudulent or criminal. *Wiggin v. Amory*, 178.

COMMON CARRIERS.

1. **LIABILITY.** — A common carrier, undertaking generally the carriage of goods, is liable for all losses except such as are occasioned by the act of God, the act of the public enemies, or the act or default of the party sending the goods. *Williams v. Grant*, 235.
2. **ACT OF GOD.** — The term "act of God," comprehends all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent. The striking of a vessel upon a rock not generally known to the master, is *prima facie* an act of God, for which the carrier is not responsible. *Id.*
3. **WHO ARE.**—A person who receives and forwards goods, taking upon himself for a compensation all the expenses of transportation, but who has no interest or control in the vessel by which they are forwarded, cannot be held liable as a common carrier. *Roberts v. Turner*, 311.
4. **NOTICE LIMITING CARRIER'S RESPONSIBILITY.**—Carriers of goods and merchandise for hire are responsible for loss of articles delivered to them to be carried, but if they can by advertisement exonerate themselves from responsibility, in certain cases, the language of the publication should be plain, explicit and free from all ambiguity. *Barney v. Prentiss*, 670.
5. **LIABILITY.**—The master is liable upon a bill of lading signed by him, com-

taining no other exception than the dangers of the sea, though the goods are damaged by the unskillfulness of the pilot. *Harvey v. Pike*, 693.

See DAMAGES, 2.

CONFLICT OF LAWS, 1.

1. **FOREIGN ASSIGNMENT, WHEN VOID.** — An assignment by an insolvent debtor in Pennsylvania, of all his property in trust for such of his creditors as should within four months, release their demands against him, the surplus to be divided *pro rata* among his other creditors, and the remainder, if any, to be paid over to the insolvent, was held void as against a creditor here, who after such assignment and notice thereof to a debtor here, summoned such debtor as the trustee of the insolvent. *Ingraham v. Geyer*, 132.
2. **STATUTES OF OTHER STATES.** — Where the statute of another state makes penal the purchase of choses in action by certain officers, but operates only as to the remedy without affecting the validity of the debt, such statute cannot be pleaded in this state to an action by the assignee of a judgment recovered in the former state. *Scoville v. Canfield*, 467.
3. **PENAL LAWS OF OTHER STATES.** — The penal laws of one state can have no operation in another state; they are strictly local. *Id.*
See BANKRUPTCY, 1, 4; CONTRACTS, 11.

CONTRACTS.

1. **VOLUNTARY SUBSCRIPTION.** — No action can be maintained upon a promise contained in a subscription paper, to pay money to "such persons as may be appointed trustees," for the erection of an academy, such promise being without consideration. *Farmington Academy v. Allen*, 201.
2. **SAME—ACTION FOR MONEY EXPENDED.** — But if upon the faith of such subscription, trustees are afterwards appointed and expenses incurred, of which the subscriber has knowledge, and to which he assents by paying part of the amount subscribed, the law will imply a promise to pay the remainder, and an action will lie therefor. *Id.*
3. **QUANTUM MERUIT.** — A contractor having undertaken to erect a bridge for a town in a particular manner at an agreed price, did his work so unskillfully that the bridge, after being used for a time, fell down and was entirely valueless, and it was held that the town could resist a recovery, either upon the contract or upon the *quantum meruit*, and was not compelled to resort to a cross-action for damages. *Taft v. Montague*, 215.
4. **ENTIRETY OF.** — Where a person agreed to work for another for a certain time, and to spin yarn at three cents per run, and afterwards left his service, and brought an action for spinning a certain number of runs, at the agreed price, it was held that the contract was entire, and must be performed as a condition precedent before any action could be maintained for the price of the labor. *McMillan v. Vanderlip*, 299.
5. **MUTUALITY.** — Where the promise of one party is the consideration of the promise of the other, the promises must be concurrent and obligatory on both parties at the same time. So, where one in writing declares he will sell to another a house at a certain price, this is a mere proposition, and not a contract. *Tucker v. Woods*, 305.

6. **CONTRACT FOR SALE OF LAND—INCUMBRANCE.**—If, at the time of a contract for the sale of land, there is a lease outstanding, unknown to the vendee, the latter may rescind, as the vendor is not in a situation to give a perfect title. *Id.*
7. **RECOVERY OF MONEY PAID ON RESCISSION.**—If the defendant chooses to rescind an agreement, the plaintiff may, under a count for money had and received, recover back money paid by him on account of the agreement; and a demand of the money before bringing the action is unnecessary. A tender of such money will not defeat the action, but will merely extinguish a claim for interest. *Raymond v. Bearnard*, 317.
8. **ACTION ON ENTIRE CONTRACT.**—Where a contract is entire, a full performance is a condition precedent to the plaintiff's right of action. *Jennings v. Camp*, 367.
9. **RECOVERY ON A QUANTUM MERUIT.**—Where a party enters into a contract and performs part of it, and then, without cause, or the agreement or fault of the other party, but of his own mere volition, abandons the performance, he cannot maintain an action on an implied *assumpsit*, for the labor actually performed. *Id.*
10. **FULL PERFORMANCE A CONDITION PRECEDENT.**—A party who has advanced money, or done an act in part performance of an agreement, and then stops short and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, cannot recover for what has been thus advanced or done. *Ketchum v. Everton*, 384.
11. **LEX FORI TO GOVERN.**—In construing and giving effect to contracts, the *lex loci* is to be considered; but in administering justice between the parties, the law of the place where the remedy is sought must govern as to the forms of procedure. *Scoville v. Canfield*, 467.
12. **TIME ESSENTIAL.**—Time may be made an essential part of an agreement; and in equity will be so regarded when the parties make it the essence of their contract. So, in a contract for the sale of lands, where a party makes a default in payments, without any just excuse, or any acquiescence, or subsequent waiver by the other party, a court of equity will not relieve the party so in default, and will deny a specific performance of the contract, after a tender of the payments due has been made. *Benedict v. Lynch*, 484.
13. **INADEQUATE CONSIDERATION—RESCISSION.**—Mere inadequacy of price, unless it be so gross as to amount to evidence of actual fraud, is not a ground for avoiding a sale, although the court might refuse to decree a specific performance. *Osgood v. Franklin*, 513.
14. **OFFER OF PERFORMANCE NOT EXCUSED.**—Where, by articles of agreement for the sale of land, the plaintiff was to give a lawful deed of conveyance to the defendant, who was to pay a certain sum therefor, and procure a sheriff's deed of the property sold for unpaid taxes to be made to plaintiff, it was held that the plaintiff could not recover the consideration agreed to be paid, without making an offering to the defendant a deed of conveyance, although the latter had taken the sheriff's deed in his own name, and had never conveyed to the plaintiff. *Dearth v. Wilkerson*, 652.

15. **INDEPENDENT COVENANTS, CONSIDERATION.**—In independent covenants, the reciprocal covenants themselves, and not their performance, is the consideration. *Pike v. Thomas*, 741.
16. **CONTRACTS, RESTRAINT OF TRADE.**—An agreement to restrain a party from pursuing his trade in any part of the country, is void, as against public policy; but it seems that a contract founded on a valuable consideration not to carry on business in a particular place or particular section of the country, leaving open the major portion of the country for the carrying on of the business, is not liable to the same objection. *Id.*

CONTRIBUTION.

1. **CLAIM FOR.**—One who has paid a judgment recovered against him for an entire demand for which another, not a party to that suit, was jointly liable with him, cannot maintain an action against him for contribution. *Murray v. Bogert*, 466.
2. **BASIS OF.**—Purchases at a sheriff's sale of several parcels of land must contribute to the redemption of a prior mortgage of the whole, in proportion to the actual relative values at the time of sale, in preference to the prices at which they were sold. *Cheesebrough v. Millard*, 494.
3. **CONTRIBUTION.**—Where land is charged with a burden, each part should bear its just proportion, and equity will not permit the creditor, by any assignment or other act, to deprive co-debtors or owners of the land of their right of contribution against each other. *Stevens v. Cooper*, 499.

CORPORATIONS.

1. **POWER OF OFFICERS TO BIND.**—A banking company organized under the same name as that of a former one, appointed the same president and cashier, and received and issued the notes of the former company, the officers frequently declaring that there was no difference between these notes and those of the new company. It was held that the new company did not thereby become liable for the notes of the former company. *Wyman v. Hollowell Bank*, 194.
2. **CONTRACT OF—USAGE.**—Corporations may, by a course of usage, render themselves liable upon contracts executed in a different mode from that authorized by their charters. *Bulkeley v. Derby Fishing Co.*, 271.
3. **SUBSCRIPTION, A PROMISSORY NOTE.**—A subscription by which one agrees to pay to a corporation a certain sum for every share of stock set opposite his name, in such manner and proportion, and at such time and place as shall be determined by the trustees of the company, is a promissory note within the statute, although the word "bearer," or "order," is not used, and no consideration need be averred in the declaration. *Dutchess Cotton Mfy. v. Davis*, 459.
4. **TURNPIKE CORPORATION'S LIABILITY TO REPAIR.**—Where a turnpike corporation was indicted for not keeping a bridge in repair on the line of their road, but on an unfinished part thereof, it was held that the corporation was not liable, as their charter provided that their power should cease and be of no effect, so far as related to the unfinished part. *State v. Morris T. Co.*, 579.

INDEX.

COVENANTS IN DEEDS.

1. **BREACH OF COVENANT OF QUIET ENJOYMENT.**—The recovery of damages in an action of trespass *quare clausum fregit*, against one who has entered under a deed containing a covenant for quiet enjoyment, will constitute a breach of such covenant. *Williams v. Shaw*, 706.
2. **EVIDENCE OF EVICTION.**—The judgment in such action is evidence to show the eviction, but is not conclusive against the warrantor as to the title of the land.

CRIMINAL LAW.

1. **PERJURY—SUFFICIENCY OF INDICTMENT.**—In an indictment for perjury it is not necessary that it should appear whether the witness was subpoenaed or whether he attended voluntarily, or that the false testimony was given in answer to a specific interrogatory. *Commonwealth v. Knight*, 72.
2. **SAME—ALLEGATION OF JURISDICTION.**—It is sufficient to allege, in such an indictment, that the perjury was committed in the trial of an issue duly joined, without an express allegation that the cause of action was within the jurisdiction of the court. *Id.*
3. **SAME—MATERIALITY OF EVIDENCE.**—It is necessary that the indictment should aver that the facts respecting which the testimony was given, were material; or such materiality must clearly appear from the other facts set forth in the indictment. *Id.*
4. **MURDER TO ADVISE SUICIDE.**—If one commit suicide upon the advice of another, the adviser is guilty of murder as a principal. *Commonwealth v. Bowen*, 154.
5. **NO LARCENY BY FINDER.**—The *bona fide* finder of a lost article, as a trunk lost from a stage-coach and found on the highway, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found. *People v. Anderson*, 462.
6. **EXHIBITING OBSCENE PICTURES.**—The exhibition of an obscene picture is an offense tending to the corruption of morals, and is indictable at common law. *Commonwealth v. Sharpless*, 632.
7. **IDEM—FORM OF INDICTMENT.**—An indictment for such an offense need not charge that the exhibition was public; it will be sufficient to state that the picture was shown to sundry persons for money. Nor is it necessary that the picture be minutely described; it will be sufficient if the description will enable the jury to identify the picture with that produced in evidence. *Id.*
8. **IDEM—THE OFFENSE NOT A NUISANCE.**—The indictment need not lay the house in which the picture was exhibited to be a nuisance, as the offense is not a nuisance, but one tending to the corruption of morals. *Id.*

See **INFANCY**, 7.

CURTESY.

- INTEREST TO TENANT BY.**—A tenant by the curtesy is entitled to interest for life on the proceeds of lands devised to his wife and sold after her death by the executors of the deviser under a direction in the will. *Duncomb v. Duncomb*, 504.

DAMAGES.

1. **FRAUD IN SALE.**—In an action for falsely and fraudulently representing that a certain privilege was annexed to lands sold by the defendant to the plaintiff, it seems that the measure of damages is the difference between the value of the land conveyed and the amount the plaintiff was induced to pay by the fraudulent representations. *Monell v. Colden*, 390.
2. **AGAINST COMMON CARRIER.**—In an action for the breach of a contract to transport goods to a certain place, the measure of damages is the difference between the value of the goods at the place from which they were to be transported, and the value of the same at the place to which they were to have been carried. *Bracket v. McNair*, 447.
3. **TRESPASS.**—In actions of trespass, the damages are not always to be measured by the actual cost of the thing injured or destroyed. The whole loss sustained is to be taken into view, and this depends upon its uses, its profits, the particular season or time, or occasion of the injury done, and the benefits or advantages lost thereby. *Post v. Munn*, 570.

DEEDS.

1. **UNDER DURESS.**—A deed obtained by duress may be avoided by the entry of the grantor or his heirs within twenty years. *Worcester v. Eaton*, 155.
2. **CONVEYANCE IN CONSIDERATION OF NATURAL AFFECTION.**—Where a conveyance was made to a child in consideration of natural affection, without a fraudulent intent, when the grantor was unembarrassed, the gift constituting but a small portion of his estate, and the provision being reasonable, it was held that such conveyance was valid against a creditor at the time of the conveyance. *Salmon v. Bennett*, 237.
3. **AGREEMENT FOR.**—An agreement to execute and deliver a deed for land is satisfied by executing a deed without warranty or personal covenants. *Van Ness v. Schenectady*, 330.
4. **DELIVERY.**—A deed may be effectually delivered by words, or acts without words; and the delivery may be either to the grantee or to a third person, without any special authority, for the use of the grantee. *Verplanck v. Sterry*, 348.
5. **MARRIAGE A VALUABLE CONSIDERATION.**—Marriage is a valid consideration; and if the grantee of a voluntary deed gains credit by the conveyance, and a person is thereby induced to marry, such conveyance upon the marriage ceases to be voluntary, and becomes good against a subsequent *bona fide* purchaser for a valuable consideration. And it makes no difference whether any particular marriage was in contemplation at the time of the voluntary settlement, or that the grantee married without the consent of her father, the grantor. *Id.*
6. **DELIVERY OF DEED.**—When one executed a deed, in consideration of love and affection, to two of his sons, and delivered the same to a third person, to be by him delivered to the grantees, in case the grantor should die intestate; and the deed was delivered to the grantees, the grantor having died intestate, it was held that the deed was valid and took effect from the first delivery. *Ruggles v. Lawson*, 375.

7. PERFORMANCE OF CONTRACT "TO GIVE" DEED.—Where one covenants "to give a deed of" certain premises, contracted to be sold, the covenant is fulfilled by executing a conveyance of the property without warranty, or personal covenants. *Ketchum v. Evertson*, 384.
8. COVENANT TO CONVEY.—A covenant to give a "lawful deed of conveyance," means a deed conveying a lawful or good title. *Dearth v. Williamson*, 652.
9. CONVEYANCE BY ATTORNEY.—Where an attorney in fact conveys land in his own name, without reference to the power given him, or to his principal, nothing passes by the deed. *Scott v. McAlpin*, 703.
10. PROOF OF EXECUTION.—If the subscribing witness cannot recollect his attestation, but recognises his handwriting, and declares it was his practice never to attest without hearing the acknowledgment of the parties, this is evidence to be left to the jury as to the execution of the deed. *Allen v. Trimble*, 726.

DEFEASANCES.

CONSTRUCTION OF DEFEASANCE.—One agreement may operate as a defeasance of another, but whether a second agreement should operate to defeat a former one, is matter of law depending upon the construction of the instrument itself; and a plea founded upon a parol averment that it was so intended is insufficient. *Pike v. Thomas*, 741.

DIVORCE.

See HUSBAND AND WIFE, 2.

DOWER.

1. LEGACY IN LIEU OF.—A pecuniary legacy to the testator's wife will not be held to be in lieu of dower, unless it is so expressed in the will, or unless the testator's intention that it should be so considered can be deduced from the terms of the will by clear and manifest implication, so that the allowance of dower would, in effect, defeat or disturb the will. *Adair v. Adair*, 539.
2. *IDEM*.—When a testator gave his wife, in addition to the necessary household goods, a legacy of five hundred dollars, "to be left in the hands of his executors, to be paid to her for her support, at any time, or at all times, as her need might require," and, after bequeathing sundry legacies to other persons, directed his executors to sell the real estate, etc., and to pay the money, as they might think proper, to the legatees, the wife's legacy, which was inferior in value to the dower, and which was in fact paid out of the proceeds of the real estate, was held not to be in lieu of dower. *Id.*
3. ACCEPTANCE OF LEGACY.—Acceptance by a widow of a legacy given in lieu of dower, does not bar her right of election, unless made with full knowledge of the consequences. *Id.*

DURESS.

See DEEDS, 1.

EASEMENTS.

1. **LESSER AND AIR IMPLIED.**—Where the owner of land, with a house thereon, sold the house without any exception, or any reservation of a right to build on the adjoining ground, or to obstruct the lights in the house which he sold, he cannot afterwards stop those lights by building on the adjoining land, nor can he convey this right to another; and if either the grantor or his assigns build upon the adjoining ground, so as materially to impair the beneficial enjoyment of the house sold, he will be liable to the grantee in an action, as for a nuisance, without any reference to the time such easement was enjoyed. *Story v. Odin*, 46.
2. **LATERAL SUPPORT.**—Where one built a house on his own land, within two feet of the boundary line, and ten years after the owner of the land adjoining, dug so deep into his own land as to endanger the house, and the owner of the house, on that account, left it and took it down, it was held that the latter could not recover for injuries done to the building, but was entitled to damages arising from the fall of the soil into the pit so dug. *Thurston v. Hancock*, 57.
3. **ANCIENT MILL.**—One owning an ancient mill may lawfully go upon the land of another to remove an obstruction, erected across the stream for the purpose of irrigation, which prevents the mill from working. *Colburn v. Richards*, 160.
4. **RIGHT BY PRESCRIPTION.**—No period short of twenty years is sufficient to raise the presumption of a grant to an easement; and to establish a prescriptive right, there must be an uninterrupted adverse enjoyment under a claim of right. *Gayetty v. Bethune*, 188.
5. **WAY BY EXPRESS GRANT.**—A grant of land, with "all the privileges and appurtenances thereto belonging," will not give an easement not already existing. *Id.*
6. **WAY BY NECESSITY.**—A way of necessity exists only when there is no other outlet to a public highway. *Id.*
7. **RIGHT OF WAY.**—Where land is granted with a right of way, that right is appurtenant to every part of the land thereafter granted, no matter how small. *Watson v. Bioren*, 617.

EJECTMENT.

- PLAINTIFF'S TITLE FAILING AS TO PART.**—In an action of ejectment, where the plaintiff claims under demises from two different lessors for moieties of the premises, if the title under one of the lessors is not made out, yet the plaintiff may recover according to the title proved in the other lessor. *Allen v. Trimble*, 726.

EMINENT DOMAIN.

1. **TAKING PRIVATE PROPERTY FOR PUBLIC USE.**—The legislature has no power to take private property for public uses, without providing for previous compensation to the owner. *Gardner v. Newburgh*, 526.
2. **SAME—DIVERTING WATER TO TOWN.**—Where a statute authorized the trustees of a town to enter upon the lands of an adjoining proprietor, and take water by conduits from a spring thereon, upon making compensation to such proprietor, but omitted to provide for compensation to the

owners of adjacent lands through which the stream ran, which was thereby diverted, the court granted an injunction against the diversion of such stream, until compensation should be made to the owners of such adjacent lands. *Id.*

3. **STATUTES TAKING PRIVATE PROPERTY.**—Acts authorizing invasions of the rights of property for private convenience or profit must be strictly construed. *Belknap v. Belknap*, 548.
4. **SAME.**—Under a statute authorizing the owners of swamp or bog meadow land to drain the same, and, if necessary, upon making compensation as therein provided, to "continue" their ditches through "lands adjoining," the proprietors of a tract of such land opened a ditch for the drainage of the same into a certain lake; and in order to lower the water in the lake so as to increase the fall, undertook to deepen the outlet at the other side of the lake, a mile distant, to the great detriment of mill-owners and other property holders along the line of such outlet. It was held that this was not within the authority of the act. *Id.*

EQUITY.

1. **GROUND OF RELIEF.**—A court of equity will not interfere where the ordinary rules of law afford complete and adequate relief; for the object of equity is to supply the deficiencies of the law. Therefore, where a person has a right to a ferry, and another sets up a free ferry adjacent, whereby the owner of the ferry loses his profits, an injunction will not be granted against the free ferry, because a court of law may place the owner of the ferry *in statu quo*. *Long v. Merrill*, 700.
2. **INJUNCTION DENIED.**—Where a defendant might have availed himself of a remedy at law, equity will not sustain a bill for an injunction on the ground of an omission to prove a material fact in consequence of erroneous advice by counsel. *Fentress v. Robins*, 704.
3. **PURCHASE FOR VALUABLE CONSIDERATION.**—Equity, following the law, will not compel a purchaser for a valuable consideration without notice to give up any legal advantage he has over his adversary, nor compel a discovery of title, or title deeds or boundaries, nor to surrender title deeds, nor suffer testimony to be perpetuated against him. But where there is no more required than what a court of law would compel him to perform, equity will not protect him, and will not allow him to withhold the property of another. *Jones v. Zollicoffer*, 708.
4. **PRIORITY OF LEGAL TITLE.**—When a bill is filed by one having the legal title, but under such circumstances that he cannot obtain complete redress at law, it is no defense for the purchaser to plead that he purchased for a valuable consideration without notice. This will only protect an innocent purchaser after he has got the legal title. *Id.*
5. **PRIORITY OF EQUITIES.**—A junior equity can in no case prevail over an older one, except where it has also the legal title; the rule being that where there is equal equity on both sides the law shall prevail. *Id.*

See MISTAKE, 1, 2, 3.

ESCROWS.

1. **NOTE AS.**—In an action upon a promissory note to which *non-assumpsit* is pleaded, the plaintiff may show by parol that it was delivered as an es-

crow, and what the conditions were upon which it was to take effect, and that there has been full performance on his part, and non-performance by the defendant, even though such conditions include a parol agreement for the sale of lands. *Couch v. Meeker*, 274.

2. **WHEN TAKES EFFECT.**—An escrow takes effect instantly upon the performance of the condition without any formal delivery over by the depository. *Id.*

ESTOPPEL.

1. **ESTOPPEL.**—A person entering into a contract with a corporation, under its corporate name, cannot object that it had not been duly incorporated. *Dutchess Cotton Mfg. v. Davis*, 459.
2. **SUBSEQUENTLY ACQUIRED TITLE.**—When one sells and conveys lands to which he has no title, but afterwards acquires title, his heirs will be estopped to deny the title in the grantee. *McWilliams v. Nisby*, 654.
3. **IDEM.**—Where land is conveyed with certain restrictions on the power of alienations, and the grantee aliens in violation thereof, but by subsequent events, such restrictions are at an end, his heirs are estopped from contesting the validity of the conveyance. *Id.*

See JOINT TENANCY.

EVIDENCE.

1. **TO VARY DEED.**—A deed, absolute on its face, cannot be avoided or controlled by parol proof of usury, or of any condition or trust not expressed in such deed. *Flint v. Sheldon*, 162.
2. **PAROL DECLARATIONS AFFECTING TITLE.**—Upon a trial of the right to real property, the verbal declarations of a party respecting his title, which have not been acted upon, are not admissible as evidence. *Barnard v. Pope*, 225.
3. **HEARSAY UPON QUESTION OF PEDIGREE.**—Hearsay evidence, proving relationship, to be admissible, must come from a deceased member of the family, and be free from the presumption of interest or bias, and the name of the person making the declarations must be given by the witness. *Chapman v. Chapman*, 277.
4. **IDEM.**—A declaration of a deceased member of a family that a person claiming an inheritance was an "heir" or "relative" of the ancestor, is not admissible to prove such inheritance. The particular relationship must be stated, so that the court may know whether the person was an heir or not. *Id.*
5. **DEED IN EVIDENCE.**—A deed produced at a trial, pursuant to notice from the opposite party, is *prima facie* to be taken as duly executed, and may be read in evidence without proof of its execution. *Betts v. Badger*, 309.
6. **QUESTIONS WITNESS NEED NOT ANSWER.**—A witness either on the *voir dire* or on cross-examination is not bound to answer any question which would subject him to punishment, or render him infamous or disgraced. *People v. Herrick*, 364.
7. **RECORD OF CONVICTION OF WITNESS.**—The party who would take advantage of the exception that a witness has been convicted of *crimen falsi*

must have a copy of the record of conviction ready to produce in court. *Id.*

8. JUDGMENT AGAINST VENDEE EVIDENCE.—In an action on the case for falsely affirming a chattel sold to have been the property of the vendor, the vendee may give in evidence against the vendor, a judgment obtained by the rightful owner for the recovery of the chattel in an action against the vendee, the allegation that the vendor was present as a witness at such action being tantamount to an allegation of notice to the vendor of the pendency of the suit. *Barney v. Deacey*, 372.
9. TO EXPLAIN WILL.—Parol evidence can be admitted to control the terms of a will only in two cases, namely, to explain a latent ambiguity, and to rebut a resulting trust. *Mann v. Mann*, 416.
10. TO SHOW OBJECT OF ASSIGNMENT.—Where an assignment, absolute on its face, is admitted to have been made as a general security, it may be shown by parol to have been intended to secure specific debts. *Moses v. Murgatroyd*, 478.
11. TO VARY WRITING.—In equity, as well as law, parol evidence is inadmissible to contradict or substantially to vary the import of a written agreement where no fraud, mistake or surprise in its execution is alleged. *Stevens v. Cooper*, 499.
12. COVENANT OMITTED.—Parol evidence may be offered by a lessee showing that at the time a written lease was executed, the lessor agreed to perform and insert a certain covenant, which was omitted in the lease. *Christ v. Diefenbach*, 624.
13. FRAUD AND MISTAKE.—It is well settled that parol evidence is admissible in cases of fraud, and of plain mistake in drawing a writing. *Id.*
14. GRANTOR'S DECLARATIONS.—Where executors were empowered by a will to sell certain lands, and one of them entered into articles of agreement with the plaintiff to sell the lands to him, evidence of the declarations of the acting executors, prior and subsequent to plaintiff's entry under the articles, is admissible to establish the title in him. *Taylor v. Adams*, 665.
15. GRANTEE'S DECLARATIONS.—The declarations of the grantee at the time of taking possession, are not admissible in his own favor. *Id.*
16. QUESTIONS WITNESS MUST ANSWER.—A witness, upon an issue between other parties, and in which he has no interest, is bound to answer questions touching the issue in that cause, although the answer thereto may expose him to a civil action. *Taney v. Kemp*, 673.

See DEEDS, 10; FRAUDULENT CONVEYANCES, 1.

EXECUTIONS.

1. LEVY UPON JOINT ESTATE.—An execution against one holding lands in joint-tenancy or tenancy in common, cannot be levied upon part of such lands by metes and bounds. *Bartlett v. Harlow*, 76.
2. AGAINST TENANT IN COMMON.—An execution against one tenant in common cannot be levied by metes and bounds on a part of the land held in common, but must be extended over the whole tract, and such undivided proportion taken as will satisfy the debt. *Starr v. Leavitt*, 268.

3. **SAME—LEVY UPON DISTINCT TRACTS.**—When a debtor holds as tenant in common in two distinct tracts, by different titles, his creditor cannot spread his execution over both tracts and take a part of the debtor's interest in each, but must take his whole interest in one before resorting to the other. *Id.*
4. **NO IMPRACHMENT OF SCIRE FACIAS COLLATERALLY.**—A *scire facias* to revive a judgment, irregularly issued, or an execution issued after the statutory time, without *scire facias*, is voidable only, and cannot be called in question in a collateral action, so as to defeat the title of a purchaser under the execution. *Jackson v. Delancy*, 403.
5. **PRIORITY.**—Where several executions in favor of different plaintiffs, and against the same defendant, have been placed in the hands of a sheriff, it is his duty to satisfy that execution which was first received. *Tabb v. Harris*, 732.
6. **IDEM—LIEN.**—But a former execution not levied, and returned, does not create a lien, to the exclusion of a second judgment-creditor, who delivers his execution to the sheriff, in whose hands there was no other execution against the debtor. *Id.*

EXECUTORS AND ADMINISTRATORS.

1. **CHARGEABLE WITH INTEREST.**—Where executors are negligent in not paying over moneys of the estate, or in not investing the same, they are chargeable with interest thereon. *Duncomb v. Duncomb*, 504.
2. **REASONABLE TIME FOR INVESTMENT.**—In most cases six months will be a reasonable time to allow executors to make investment of the trust funds before charging them with interest. *Id.*
3. **COSTS AGAINST.**—Executors will not be compelled to pay costs for litigating a demand of the devisees for interest on trust funds, where the demand includes more than the devisees are entitled to receive. *Id.*
4. **COMPOUND INTEREST AGAINST ADMINISTRATOR.**—An administrator who converts the trust moneys to his own use, or employs them in his business without accounting for the profits, is chargeable with compound interest. *Shieffelin v. Stewart*, 507.
5. **SUIT BY EXECUTOR—PROBATE OF WILL.**—In a suit by an executor, probate of the testator's will, taken out at any time before the hearing, is sufficient to support the plaintiff's demand, no objection having been made by pleading. *Osgood v. Franklin*, 513.
6. **POWER—SURVIVORSHIP.**—A power given by a will to the executors to sell real estate survives if it be coupled with a legal or equitable interest in the estate or with a trust, the execution of which depends upon the sale. *Id.*
7. **LIABILITY OF.**—An executor is liable only for the amount actually received upon a sale of property of the estate, unless he has been guilty of very gross negligence, or of willful default. *Id.*
8. **PERSONAL LIABILITY OF.**—An executor who promises to pay a debt of his testator, and has assets at the time of the promise, is personally liable. *Sleighter v. Harrington*, 715.

EXECUTORY DEVISE.

See WILLS, 8.

FACTORS.

See STOPPAGE IN TRANSIT, 2.

FISHERY.

See TRESPASS, 2.

FIXTURES.

WOOL-CARDING MACHINES NOT.—Machines in a factory for carding wool, though they cannot be removed without being taken to pieces, are not fixtures, and are liable to attachment as the property of the mortgagor of the building and appurtenances who remains in possession. *Gale v. Ward*, 223.

FRAUD.

1. **IN SALE OF LANDS.**—An action on the case for a deceit lies for fraudulently selling land which has no existence, though there are covenants in the deed, which the plaintiff may disregard. *Wardell v. Fosdick*, 383.
2. **FRAUDULENT REPRESENTATION IN SALE.**—Where a person was induced to purchase land upon the false and fraudulent representation, that a certain privilege was annexed thereto, but which is not included in the deed, he may maintain an action on the case against the grantor. *Monell v. Colden*, 390.

FRAUDULENT CONVEYANCES.

1. **GRANTOR'S DECLARATIONS.**—Where a conveyance is claimed to have been made in fraud of creditors, the declarations of the grantor prior to the conveyance, with respect to his financial embarrassments, are admissible as evidence of a fraudulent intent on his part. *Bridge v. Eggleston*, 200.
2. **VALIDATING VOIDABLE CONVEYANCE.**—A conveyance, voidable on account of fraud or covin, may be made valid and effectual by matter *ex post facto*. *Verplank v. Sterry*, 348.

GENERAL AVERAGE.

1. **VOLUNTARY STRANDING.**—Where a vessel is voluntarily run ashore with the intent to preserve the ship and cargo as far as possible, and the vessel is in consequence lost, the loss is to be repaired by the general average. *Gray v. Wain*, 642.
2. **RULE FOR VALUATION OF SHIP.**—The value of a vessel lost under circumstances which entitle her to contribution in general average, is to be estimated at the price she would have borne in the place where the voyage commenced, deducting the expenses of carrying her there, and making a reasonable allowance for any deterioration she may have suffered up to the time when the loss happened. *Id.*

HUSBAND AND WIFE.

1. **LIABILITY FOR WIFE'S NECESSARIES.**—The overseers of the poor of a town may maintain an action against a husband for necessities furnished to

his wife, though they may also have a remedy against the town wherein he is legally settled. *Hanover v. Turner*, 203.

2. **DIVORCE IN ANOTHER STATE—DOMICILE.**—Where a husband and wife are citizens and residents of one state, and the husband removes into another temporarily, for the purpose of procuring a divorce, such divorce is void in the state in which the parties have their domicile. *Id.*

INFANCY.

1. **CONTRACTS.**—A sale made to an infant by a person of full age is voidable only by the infant. *Oliver v. Houdlet*, 135.
2. **POWER OF GUARDIAN.**—A guardian has no power to avoid any contract made with his infant ward, which is for the benefit of the latter. *Id.*
3. **RATIFICATION OF CONTRACTS.**—There need not be a direct promise to pay on the part of an infant after coming of age, to ratify a contract made during his minority; any words will be sufficient which import an express recognition and confirmation of the contract. *Id.*
4. **INFANT PARTNER.**—A promissory note made for a partnership debt and in the firm name, by an adult partner, is not void as to his infant copartner, but voidable, and may be ratified by the latter on his coming of age. *Whitney v. Dutch*, 229.
5. **NECESSARIES SUPPLIED TO INFANT.**—Where a parent neglects to furnish his infant child with necessaries, a third person may supply the infant therewith and charge the parent for the same; but what is actually necessary will depend upon the precise situation of the infant, of which the party giving the credit must inform himself at his peril. *Van Valkenburgh v. Watson*, 395.
6. **CONFESSIONS OF INFANTS.**—Upon his mere naked confessions, an infant under twelve years of age cannot be convicted of a capital offense. *State v. Aaron*, 592.
7. **INFANT'S CAPACITY FOR CRIME.**—Between the age of seven and fourteen years an infant shall be presumed incapable of committing crime; but this presumption may be rebutted, and if it appear by strong and irresistible evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted and receive judgment of death. *Id.*

See **STATUTE OF LIMITATIONS**, 1.

INJUNCTION.

See **EQUITY**, 2.

INNKEEPERS.

LIABILITY.—An innkeeper is liable for the goods of his guests stolen from the inn. So, where a sleigh loaded with grain was put into an out-house appurtenant to the inn, "where it had been usual for the defendant to receive loads of that description," and the door was broken open during the night and the grain was stolen, the innkeeper was held responsible for the loss, without proof of negligence. *Clute v. Wiggins*, 448.

INSOLVENT LAWS.

1. **STATE INSOLVENT LAWS.**—In the absence of a national bankrupt system, the several states have power to pass local insolvent laws. *Blanchard v. Russell*, 106.
2. **WHAT DEMANDS NOT DISCHARGED.**—Until demand of payment has been made, the liability of one who has received money to the use of another is not a "debt," within the meaning of an act discharging insolvent debtors from all "debts," etc. *Pease v. Folger*, 213.

INSURANCE—LIFE.

1. **VALID CONTRACT.**—A policy of insurance upon life is a legal and valid contract. *Lord v. Dall*, 38.
2. **INSURABLE INTEREST.**—A single woman, dependent on her brother for her support and education, has a sufficient interest in his life to entitle her to insure it. *Id.*
3. **ILLEGAL OCCUPATION OF INSURED.**—And the fact that the brother was engaged in an illegal trade will not of itself deprive her of her right to recover on the policy, she not having known of such illegal employment, nor having participated therein. *Id.*

INSURANCE—MARINE.

1. **FEAR OF CAPTURE NO GROUND FOR ABANDONING.**—An American vessel was at Buenos Ayres when the news of the war between the United States and Great Britain reached that place; at the same time two British vessels of war were lying in the river below the vessel, whose commanders expressed their intention of capturing any American vessel that attempted to go to sea. From this cause alone the vessel was prevented from sailing, and an abandonment offered to the insurers. It was held there was no loss absolute or technical that would authorize an abandonment. *Brewer v. Union Ins. Co.*, 53.
2. **INSURABLE INTEREST.**—One who charters a vessel with a stipulation to insure has an insurable interest, and, unless questioned by the underwriters, is not bound to disclose the nature of his interest. *Bartlet v. Walter*, 143.
3. **WHEN VESSEL DEEMED "AT SEA."**—A vessel was insured for twelve calendar months, with an agreement that if she should be at sea when the year expired, the risk should continue at an agreed premium until she reached her port of discharge; and it was held that being in a foreign port at the expiration of the term, having been captured and carried thither against the will of the master, she was still "at sea" within the meaning of the policy. *Wood v. N. E. Ins. Co.*, 182.
4. **IDEM—EXCEPTED RISK.**—An exception in a policy of insurance against any loss arising from the violation of existing laws or regulations of belligerent nations, restricting neutral commerce, does not cover a loss occurring from the violation of any decree subsequently made. *Id.*
5. **DUTY IN RESPECT TO CARGO WHEN DISABLED.**—The master is bound, when the ship becomes disabled during her voyage, to procure another vessel, if in his power, to bring the cargo to the port of destination; but

he is not bound to seek another vessel out of the port of distress, or out of a port immediately contiguous thereto. *Salts v. Ocean Ins. Co.* 290.

5. **RECOVERY FOR TOTAL LOSS.**—A policy was made on freight from Riga to New York. The bulk of the cargo consisted of hemp, and the residue of manufactured goods and iron. The vessel sprung a leak and put into Kinsale in distress, where, after a survey, she was found incapable of prosecuting her voyage, unless repaired at an expense equal to her value; and the master, with the advice of the merchants and others at Kinsale, sold the hemp there, and shipped the residue of the cargo in another vessel to New York, which, however, was not capable of taking more than one third of the hemp, as there was no machinery to pack and stow it in the Russian mode. It was held that the insured were entitled to recover for a total loss of the freight, it not appearing that the goods reshipped had reached New York, or that any freight had been earned. *Id.*

INTEREST.

1. **COMPOUND.**—Interest upon interest is never allowed except upon a settlement of accounts between the parties, after interest had become due, or upon an agreement for that purpose, subsequent to the original contract, or upon a master's report, which has been confirmed, computing the principal and interest due. *Connecticut v. Jackson*, 471.
2. **COMPUTATION OF.**—Rule for computing interest in case of partial payments, stated. *Id.*
3. **WHEN ALLOWED.**—In an action on a covenant to pay property, it is discretionary with the jury to allow interest on the value of the property or not; and if the court instruct the jury to find damages to the full amount of interest, it will be error. *Guthrie v. Wickliffe*, 746.

See **EXECUTORS**, 1, 4.

JOINT-TENANCY.

CONVEYANCE BY JOINT-TENANT.—Although a conveyance by one joint-tenant or tenant in common of a part of the land, by metes and bounds, to a stranger, whether the conveyance be by deed or by levy of an execution, can have no legal effect to the prejudice of a co-tenant; yet such a conveyance will operate as an estoppel against the grantor and those claiming under him. *Varnum v. Abbot*, 87.

JURY.

1. **LIST OF TALESMEN.**—Under the act providing that one accused and indicted for murder shall have a list of the jury delivered to him two entire days at least before the trial, the accused is entitled to a list of the talesmen for the same length of time, where a *tales* has been awarded, unless such right be waived. *State v. Aaron*, 592.
2. **FINDING OF.**—The jury can only find on facts put in issue; to find that a sale is "justifiable" is a conclusion of law beyond their province. *Jones v. Zollicoffer*, 709.

LANDLORD AND TENANT.

1. **ASSUMPSIT AGAINST LESSOR HOLDING OVER.**—*Assumpsit* for use and occupation lies against a lessee by deed who holds over after the expiration

of the term, or against a lessee holding under a covenant for a renewal in a lease which has expired. *Abel v. Radcliff*, 377.

2. **COVENANT TO RENEW LEASE.**—The lessor's covenant to let the land to the lessee, at the expiration of the term without mentioning any price or terms, is void for uncertainty. *Id.*
3. **ACTION FOR USE AND OCCUPATION.**—An action for use and occupation can be maintained only where the relation of landlord and tenant exists between the parties, and it will not lie against a person who has come in under the plaintiff as a purchaser from him. *Bancroft v. Wardwell*, 396.
4. **ATTORNMENr WHEN VOID.**—An attornment to one who enters upon land without title, is void, and such entry and attornment are not a disseisin or ouster to create an adverse possession in the one so entering. *Jackson v. Delancy*, 403.

LEGACIES.

WHEN VEST.—A legacy payable in installments after the legatee arrives at the age of eighteen, and in case she dies before attaining the age of twenty-one years, unmarried or without lawful issue, then, or in either case, over, is vested absolutely in the legatee upon her arriving at the age of twenty-one, although she died soon after without issue. *Scott v. Price*, 629.

See DOWER, 1, 2, 3.

LIENS.

1. **RELATIVE RIGHT OF LIENORS.**—A creditor who has a lien upon two funds will be compelled, in favor of a subsequent lienor having a claim upon one of the funds only to satisfy his debt from the other fund. *Chesbrough v. Millard*, 494.
2. **SUBROGATION.**—The doctrine of subrogation is founded on principles of equity, and not on contract. Therefore, where a creditor having a lien on two pieces of land, release one of them, without any notice of the claim of another creditor, whose lien extends only to the other, the former is not to be prejudiced by his inability to subrogate the latter to his lien on the property which has been released. *Id.*

MALICIOUS PROSECUTION.

WHEN ACTION LIES.—The action for a malicious prosecution will not lie for prosecuting a civil suit, in a court of common law having competent jurisdiction, by the party himself in interest, unless the defendant has, upon such prosecution, been arrested without cause and deprived of his liberty, or made to suffer other special grievance different from, and superadded to, the ordinary expense of a defense. *Potts v. Imlay*, 603.

MISTAKE

1. **DEED—PAROL PROOF.**—Equity will relieve against a mistake in a deed or contract in writing, upon satisfactory parol proof of such mistake, whether the relief is sought affirmatively by a suit to reform the contract, or by way of defense to a bill for specific performance, and this notwithstanding the fact that the mistake is denied by the opposite party. *Gillespie v. Moon*, 559.

2. **IDEM.**—Thus, where a trustee for an infant, intending to convey two hundred acres, part of an entire tract of two hundred and fifty acres, by a mistake in the description, conveyed the whole tract; in a suit brought by the *cestui que trust* after the death of the trustee, the court, upon parol proof of the mistake, decreed a reconveyance of the fifty acres erroneously included in the deed. *Id.*
3. **DEGREE OF PROOF REQUIRED.**—The proof in such cases must be clear and strong, so as to establish the mistake to the entire satisfaction of the court. *Id.*
4. **AQUIESCENCE.**—Where the conveyance in which the mistake occurred was made by a trustee for an infant in 1804, and the trustee upon discovery of the mistake, in 1806, notified the agent of the vendee that he intended to apply to the court for relief, but died in 1814, without having taken any steps for that purpose; and the *cestui que trust* brought the suit immediately after the trustee's death, it was held that the relief was not barred by acquiescence. *Id.*
5. **COMPENSATION FOR IMPROVEMENTS.**—A vendee of land conveyed by mistake is not entitled to compensation for improvements made thereon after he has knowledge of the mistake, and after he has declared his intention to take advantage of it. *Id.*

MORTGAGES.

1. **ASSIGNMENT.**—By an assignment of a mortgage, either by an indorsement on the back thereof or by a separate instrument referring to such mortgage, the assignee is put in the place of the mortgagee to all intents and purposes, unless a different intention is apparent from the contract. *Hills v. Elliot*, 28.
2. **ENTRY TO SUPPORT FORECLOSURE.**—When the mortgagee enters on the mortgaged premises before condition broken, he may commence his foreclosure without any new entry by declaring that he holds for condition broken, after that event shall have occurred; if he makes no such declaration, the mortgagor may elect to consider him in as claiming to foreclose, by bringing his bill of equity at any time within the statutory period, after a tender of performance according to the terms of the mortgage. *Pomeroy v. Winship*, 91.
3. **DESCRIPTION OF FORECLOSED LAND.**—In the sheriff's notice of the sale of the equity of redemption, a general description of the property is sufficient. *Id.*
4. **SALE UPON CREDIT.**—The giving a reasonable time to the purchaser of such equity of redemption, to examine the title before the delivery of the deed, is not a sale upon credit. *Id.*
5. **USURIOUS CONSIDERATION.**—A mortgage upon usurious consideration is void only as against the mortgagor and those lawfully holding under him, and cannot be avoided by a purchaser of the mere equity of redemption. *Green v. Kemp*, 169.
6. **MORTGAGOR'S REMEDY AFTER CONDITION BROKEN.**—A mortgagee may declare generally on his seisin and have judgment for possession, as well after as before condition broken, either against the mortgagor or his assignee. *Id.*

7. **WHEN PRESUMED SATISFIED.**—Where the mortgagee has never entered into possession, and no demand has been made or interest paid for twenty years, the mortgage will be presumed to have been satisfied. Any evidence offered to repel this presumption must be clear and explicit. *Jackson v. Wood*, 315.
8. **POSSESSION UNDER MORTGAGEE.**—Where a mortgage gives the mortgagee a right of entry on default, and after forfeiture a judgment was obtained on the bond against the mortgagor and the devisee of the debt entered under a sale upon execution, after an irregular revival of the judgment, and under the mortgage, it was held that the mortgage was a sufficient protection of the possession of the devisee against ejectment by one claiming under the mortgagor. *Jackson v. Delancy*, 403.
9. **RECORD OF SECOND MORTGAGE.**—The recording of the second mortgage is not constructive notice to the mortgagee under a first recorded mortgage. *Cheesebrough v. Millard*, 494.
10. **RELEASE OF PART OF MORTGAGED PREMISES.**—One having a mortgage on six separate parcels of land, released four of them, one of the other two having been, with his knowledge, previously sold by the mortgagor, and it was held that the two parcels not released were subject only to their ratable proportion of the mortgage debt according to the value of all the parcels at the date of the mortgage. *Stevens v. Cooper*, 499.

See **ASSETS**, 1.

MUNICIPAL CORPORATIONS.

CONVEYANCE TO TOWN CORPORATION.—The inhabitants of a town may take and hold land in their corporate capacity. *Worcester v. Eaton*, 155.

MURDER.

See **CRIMINAL LAW**, 4.

NEGOTIABLE INSTRUMENTS.

1. **NOTICE TO INDORSER.**—A notice to the indorser of a promissory note payable at a bank, given on the day of maturity, was held to be sufficient, although it stated the note to have fallen due three days before, and although the name of the promisor was mistaken therein; it appearing in evidence that the indorser was liable on no other note payable at the bank. *Smith v. Whiting*, 25.
2. **NOTE MATURING ON SUNDAY.**—When a bill or note is payable with grace, and the last day of grace falls on Sunday, such bill or note becomes due on Saturday, and demand should be made and notice given accordingly. *Farnum v. Fowle*, 35.
3. **MAKER'S INSOLVENCY AFFECTING NOTICE.**—The known insolvency of the maker of a promissory note, for six month's previous to, and at the time of making the note, will not excuse the holder from a seasonable demand, and due notice to the indorser. *Id.*
4. **EXCLUDING DAY OF DATE.**—If a note is made payable a certain number of days after date, the day of date is to be excluded in the computation. *Woodbridge v. Brigham*, 85.

5. **NOTE PAYABLE AT BANK.**—Where a note is made payable at a specified bank, no further demand on the maker is necessary in order to charge the indorser. *Id.*
6. **NOTICE OF NON-ACCEPTANCE.**—The drawer of a bill of exchange who has, at the time, effects in the hands of the drawee, is entitled to notice of non-acceptance, although such effects be attached before presentment. *Stanton v. Blossom*, 198.
7. **REASONABLE TIME.**—Such notice is sufficient, if given within a reasonable time, although it be after the commencement of the action against the drawer. *Id.*
8. **NOTICE BY THE DRAWER INSUFFICIENT.**—In an action by the holder against the drawer of a bill for non-acceptance by the drawee, notice by the drawee is insufficient, unless authorized by the holder. *Id.*
9. **TIME ON NOTE, HOW COMPUTED.**—On computing the time on a promissory note, payable in a certain number of days after date, the day of the date is to be excluded. *Avery v. Stewart*, 240.
10. **NOTE DUE ON SUNDAY.**—Where a non-negotiable promissory note, payable sixty days from date, fell due on Sunday, a tender on the following Monday was held good. *Id.*
11. **NOTICE TO ACCOMMODATION INDORSER.**—One who indorses a promissory note made by an insolvent person, with full knowledge of the insolvency, merely to give it credit and currency, and without having any interest in it, is nevertheless entitled to notice of non-payment. *Buck v. Cotton*, 251.
12. **NOTE VOID AGAINST PUBLIC POLICY.**—A note given by an insolvent debtor to a creditor, in consideration that the latter should withdraw his opposition to the debtor's obtaining his discharge, is void. *Wiggin v. Buck*, 324.
13. **DEMAND, WHERE MADE.**—Where a note is not payable at any particular place, and the maker has a known and permanent residence within the state, the holder must make a demand of payment there, in order to charge the indorser. *Anderson v. Drake*, 442.
14. **PLACE OF DATE OF NOTE.**—Dating a note at a particular place does not of itself make that the place of demand, with respect to charging an indorser. *Id.*
15. **REMOVAL OF MAKER.**—The removal of the maker before maturity of the note from the place where the note was dated to a place within the state, where he afterwards resided, will not excuse presentment at the latter place, in order to charge the indorser. *Id.*
16. **COLLATERAL SECURITY TO INDORSER.**—Property assigned to the indorser of a promissory note by the maker, as security, is regarded as a trust for the benefit of the payee, though he have no knowledge of it at the time, and he may afterwards affirm and enforce such trust. *Moses v. Murgatroyd*, 478.
17. **INDORSER'S DEATH, EFFECT ON TRUST.**—Such trust is not discharged by the death of the indorser, but attaches to the property as long as it can be traced. *Id.*
18. **COLLATERAL SECURITY TO INDORSER.**—Collateral security given by the

maker to the indorser of a note for his indemnity inures to the benefit of the holder. *Phillips v. Thompson*, 535.

19. **ASSIGNMENT OF SECURITY TO HOLDER.**—Where an indorser of a note having taken collateral security from the maker, was not duly notified of non-payment, and afterwards assigned his security to the holder in consideration that he should be released from further liability on the note, such assignment, for the purpose of giving the holder the benefit of the security, was held to be a waiver of want of notice and a recognition of the indorser's liability. *Id.*
20. **WAIVER OF NOTICE.**—A secured indorser has a right to waive the want of notice of non-payment, and rely upon his security for indemnity, and creditors of the maker of the note have no equity to object to such waiver. *Id.*
21. **SPECIFIC APPLICATION OF SECURITY.**—Security given for a specific purpose must be applied to that purpose alone, and to no other. *Id.*
22. **NOTICE IN CASE OF INSOLVENCY.**—Due notice of non-payment is not excused, because the maker of a note was insolvent when the note was made and indorsed, and also when it fell due, although the fact was known to the indorser. *Barton v. Baker*, 620.
23. **NOTICE, WHEN UNNECESSARY.**—But if the indorser has received from the maker a general assignment of his estate and effects, notice is not then necessary. *Id.*
24. **INDORSEMENT BY ONE NOT A PAYEE.**—The first indorser of a note in point of time is not, of course, first responsible. If the payee of a note write his name over that of a person who indorsed the same in blank before delivery, but did so only on the ground of the payee's responsibility as first indorser, the payee will be liable as such in point of contract, though second in point of time. *Chalmers v. McMurdo*, 684.
25. **RIGHTS OF HOLDER.**—The holder of a bill of exchange, with indorsements in blank, may strike out the indorsements subsequent to the first, and may write over the first an assignment to himself, or the bill, without such assignment, will be considered the property of the holder, he having the power to make it. *Ritchie v. Moore*, 688.
26. **SET-OFF OF BILL.**—In an action by the indorsee against the maker of a promissory note, the latter cannot set off a bill of exchange on which the plaintiff is responsible, unless it appear that the defendant had received such bill before notice of the indorsement of the note to plaintiff. *Id.*
27. **NOTICE TO INDORSER.**—Notice of non-payment, to an indorser, should be given by the holder, or by some person authorized by him. The indorser should be informed that he is looked to for payment. *Brower v. Wooten*, 692.
28. **WHO ENTITLED TO NOTICE.**—A person indorsing a note for the accommodation of the maker is entitled to notice of non-payment. *Smith v. McLean*, 693.
29. **NOTE PAYABLE AT BANK.**—Where a note is made payable at a particular bank, it should be presented there at maturity, otherwise the indorser is discharged, and the fact that the maker waives notice makes no difference. *Id.*

NUISANCE.

EQUITY JURISDICTION TO RESTRAIN PRIVATE.—Equity has jurisdiction, concurrent with the remedy at law, to prevent an injury to private property by interrupting an ancient water-course flowing across one's land. *Bellnap v. Bellnap*, 549.

See CRIMINAL LAW, 8.

OFFICERS.

1. **JUDICIAL LIABILITY.**—It may be laid down as a universal position, which admits of no exception, that for a mere error of judgment in the execution of his office, no action can be maintained against a judge of any court. Accordingly an action will not lie against a justice of the peace for erroneously entering judgment and issuing execution against a defendant upon the confession of judgment by a co-defendant. *Little v. Moore*, 574.
2. **ACTS OF PUBLIC OFFICERS.**—Whenever public officers exceed their authority, their acts are void. *Jones v. Gibson*, 690.
3. **LIABILITY FOR JUDICIAL ACTS.**—A justice of the peace is not liable in an action at law for acts done judicially and within his jurisdiction, unless he has acted from impure or corrupt motives. *Gregory v. Brown*, 731.

PARTITION.

SEIZIN TO MAINTAIN PARTITION SUIT.—Actual corporeal seisin is not necessary to enable a tenant in common to maintain a suit for partition; constructive seisin is sufficient, unless there is proof of an ouster. *Barnard v. Pope*, 225.

PARTNERSHIP.

1. **SALE OF VESSEL BY PARTNER.**—Where a ship at sea belonging to a partnership was sold by one of the partners at home, and subsequently sold and possession delivered by the other partner abroad under whose control she then was, and who had no knowledge of the prior sale, it was held that the second sale passed the title as against the former. *Lamb v. Durant*, 31.
2. **PARTNER'S NOTE FOR FIRM DEBT.**—Where a partner gave his individual note, taking up a promissory note issued by the firm, the firm liability is thereby discharged. *Arnold v. Camp*, 328.
3. **SELLING INTEREST IN PARTNERSHIP.**—A partner cannot by selling his interest in the partnership to a third person, make him a partner against the will and consent of the other partners. *Murray v. Bogert*, 466.
4. **PARTNER SUING AT LAW.**—No action at law lies by one partner against another where there has been no settlement of the partnership accounts, and no promise by the defendant to pay the balance struck. *Id.*
5. **PROMISE TO SURVIVING PARTNER.**—In *assumpsit* by a surviving partner, upon a promise alleged to have been made to both partners, upon the plea of the statute of limitations, it was held competent for the plaintiff to give evidence of an acknowledgment to himself alone, after the decease of his partner, of a debt due to the partnership. *Barney v. Smith*, 679.

6. **SET-OFF BY PARTNER.**—In an action against a partnership, a set-off of a debt due an individual member of the firm will not be allowed. *Estlin v. Moore*, 692.

See **INFANCY**, 4.

PATENTS—LAND.

1. **IMPEACHMENT OF.**—A patent not void on its face, which has been issued by mistake or on an insufficient suggestion, can only be avoided by some direct proceeding for that purpose. It cannot be impeached collaterally. *Jackson v. Hart*, 280.
2. **EVIDENCE AS TO PATENT.**—It is always open to the defendant in an action of ejectment to show that the lessor of the plaintiff is not the person intended by the patent under which he claims, although he may bear the same name. *Jackson v. Goes*, 392.

PERJURY.

See **CRIMINAL LAW**, 1.

PLEADING AND PRACTICE.

1. **PROOF OF ATTORNEY'S AUTHORITY.**—Where an instrument under seal purports to have been executed by an attorney, and the authority of the attorney is disputed, before the instrument goes to the jury the letter of attorney must be produced to the court, who are to judge of its competency. But in simple contracts, where the agent's authority may be proved by parol, the fact of signing and the power to sign are both questions for the jury, and the order in which they shall be proved is immaterial. *Emerson v. Providence Hat Mfg. Co.*, 66.
2. **PROCESS CANNOT BE ISSUED ON SUNDAY.**—Process in a civil suit can neither be executed nor issued on a Sunday. Accordingly, where a prisoner went beyond the liberties on a Sunday, and the plaintiff, before he returned, on the same day filled up a *capias* against the sheriff in an action for the escape, and delivered it to the coroner, it was held not to be such a commencement of a suit as would prevent his pleading a voluntary return before suit brought. *Van Vechten v. Paddock*, 303.
3. **AVERMENT OF READINESS TO RECEIVE.**—In an action on a breach of agreement to deliver goods, where the plaintiff agreed to deliver to the plaintiff or his agent at a certain place, payment to be made on delivery, it is sufficient to aver that the plaintiff has at all times been ready to receive the goods and pay for the same at the place stated, without saying he was to pay at the particular time stipulated for the delivery. *Porter v. Rose*, 306.
4. **AVERMENT OF READINESS TO PAY.**—Where two acts are to be done at the same time, as where one agrees to sell and deliver, and the other to receive and pay, in an action for the non-delivery it is necessary for the plaintiff to aver and prove a readiness to pay on his part, whether the other party was at the place ready to deliver or not. *Id.*
5. **ALLEGING FRAUD IN SALE.**—In an action for fraud in a sale, it is unnecessary to set forth the contract or the consideration, as that is matter relating only to the damages. *Barney v. Dewey*, 372.

6. **PLEADING AUTHORITY.**—Where a person sues a dead or executes a covenant in behalf of others, it is incumbent upon him to set forth in his plea and prove the authority under which he acted, in order to release him from his personal liability. *White v. Skinner*, 381.
7. **PROMISE TO PAY DEBT DISCHARGED.**—Where a debt has been discharged under proceedings in insolvency, and the debtor subsequently promises to pay the debt, it is sufficient for the creditor to declare upon the original contract alone. And, in reply to defendant's plea of such discharge, it will be sufficient to allege that defendant assented to, ratified, renewed, and confirmed the promises mentioned in the declaration. *Shippey v. Henderson*, 458.
8. **ALLEGING DUE INCORPORATION.**—In an action by an incorporated company for manufacturing purposes, it is not necessary to allege a due incorporation, as the act authorizing such incorporation is a public law, and the certificate on being filed becomes matter of record. *Dutchess Cotton Mfg v. Davis*, 459.
9. **MISJOINDER OF PARTIES.**—The objection that parties have been made defendants in a suit who should have been joined as plaintiffs, goes only to a matter of form, and will not be regarded by the court at the hearing, where the parties thus made defendants have accepted that character, and have filed their answer. *Osgood v. Franklin*, 513.
10. **JUDGMENT IN DEFENDANT'S ABSENCE.**—Where judgment is entered without adjournment, in the absence of the parties and without notice to attend, it will be considered irregular. The defendant has a right to be present to hear his judgment, and an opportunity must be given to him for that purpose, either by adjournment or notice. *Van Riper v. Van Riper*, 576.
11. **PLEADING WARRANTY OF TITLE.**—A declaration alleging a failure of title in the vendor of a chattel, although it sets out no express warranty of the title, will be good after verdict, upon the ground of the implied warranty. *Payne v. Rodden*, 739.

PLEDGES.

1. **CONSIDERATION.**—A liability for another for a contract still in force, is a sufficient consideration for a mortgage or pledge; and the ratio of the consideration to the value of the thing pledged is of no importance. *Jacott v. Warren*, 74.
2. **PROPERTY IN.**—A promissory note of a third person, deposited by a debtor with his creditor as collateral security for a debt, is a pledge in which the pawnee has merely a special property, the general ownership remaining in the pawnor. *Garlick v. James*, 294.
3. **RIGHT OF PAWNEE TO SELL.**—Where the pledge is for an indefinite period, the pawnor should be called on to redeem before the pawnee can dispose of the property, and if he is absent, or cannot be found, judicial proceedings should be had to bar his right of redemption. *Id.*

POWERS.

- EXECUTION OF.**—Where a power is created by deed, empowering a husband to appoint to whom the land shall be conveyed, and, in case of his death

before his wife, empowering her to do it, there must be an actual appointment in the mode indicated, and not merely an intention in the husband, in order to defeat the wife's right of appointment. Accordingly, where a power requires, among other requisites, that the trustee should convey to such person as the husband should limit or appoint, and the husband executed an instrument of writing, authorizing the trustee to convey to whom he pleases in his discretion, this is not an execution of the power, nor a destruction of that subsequently limited to the wife. *Hasten v. Keen*, 718.

PRINCIPAL AND AGENT.

1. **DELEGATION OF AUTHORITY.**—Although a general agent of a trading company may have power to make promissory notes binding on the company, a sub-agent appointed by him would not have such authority. *Emerson v. Providence Hat Mfg. Co.*, 66.
2. **ACTS OF SUB-AGENT, WHEN BINDING.**—A sub-agent, appointed to purchase stock and sell goods for the company, may buy on credit if not prohibited; and a promissory note given by such sub-agent, not being binding on the company, will not extinguish the implied promise of the company to pay for articles so purchased. *Id.*
3. **BROKER AGENT FOR BOTH.**—A broker employed to effect a purchase may act as the agent of both parties. *Merritt v. Olason*, 286.
4. **PERSONAL LIABILITY OF PUBLIC AGENT.**—A public agent in his known official capacity, employing a man to labor on government work, cannot be held personally liable for the wages of the party so employed. *Walker v. Swartwout*, 334.
5. **PERSONAL LIABILITY OF AGENT.**—If a person execute a bond as attorney for another, without authority, such person so assuming to act is personally bound, as though he had covenanted in his own name simply. *White v. Skinner*, 381.

See DEEDS, 2.

QUESTIONS OF LAW AND FACT.

1. **MATERIALITY OF FACTS FOR THE JURY.**—In effecting a policy of insurance, whether certain facts are material to the risk, and should be disclosed to the insurers, is for the consideration of the jury, and the court has no right to direct the jury as to the materiality of such facts. *Firemen's Ins. Co. v. Walden*, 340.
2. **PROBABLE CAUSE.**—In an action for a malicious prosecution, whether there was probable cause is a question of law, but the facts which go to show it must be ascertained by the jury. *Legget v. Blount*, 702.
3. **QUESTIONS FOR JURY IN SLANDER.**—The court should instruct the jury as to the law, and leave to them the *animus* with which the words charged to be slanderous were spoken. *Bunton v. Worley*, 735.

See JURY, 2.

REAL ESTATE.

1. **LAND SOLD IN LOTS—FAILURE OF TITLE TO PART.**—If one on a sale of land in separate lots and parcels to one person, the title to one or more

of such lots fails, the vendee cannot rescind *in toto*, but he must accept a conveyance for such of the lots as the vendor is authorized to convey. *Van Eps v. Schenectady*, 330.

2. **PRESUMPTION OF CONVEYANCE.**—Where several persons having undivided interests in a tract of land, made a partition thereof, and conveyed the whole to one in trust to reconvey to each grantor his portion in severalty, and the land was held according to this partition for forty years, it will be presumed in an action of ejectment brought by one claiming by virtue of the partition, that the conveyance by the trustee in pursuance of the trust had been made. *Jackson v. Moore*, 398.
3. **ADVERSE POSSESSION UNDER LEASE.**—Where one in possession under a lease in fee, gave the possession to another by parol, who also claimed under the lease, and by sundry other conveyances the possession was obtained by the defendant, it was held that this was a sufficient adverse possession to bar an action of ejectment commenced more than thirty years after the original entry under the lease. *Id.*
4. **DEFECTIVE TITLE—PURCHASER IN POSSESSION.**—A purchaser of land who is in undisputed possession, and has received a conveyance of the same with warranty, cannot have relief in equity against payment of the purchase-money, on the ground of a defect in the title. *Abbott v. Allen*, 554.
5. **RECOVERY OF PURCHASE-MONEY.**—A purchaser of real estate cannot recover back the purchase-money in an action for money had and received where the title proves defective, unless there be fraud or warranty. *Dorsey v. Jackman*, 611.
6. **WARRANTY OF TITLE.**—There is a distinction between the sale of goods and of land in respect of a warranty title, which is implied in the former, but not in the latter. *Id.*
7. **EXCESS IN TRACT SOLD.**—Whenever it does not appear that land was sold by the tract and not by the acre, the grantee is responsible for the excess of the number of acres above the estimated quantity; and in ascertaining the amount to be paid for such excess, the average value per acre of the whole tract is the proper rule. *Hundley v. Lyons*, 685.
8. **EXECUTORY CONTRACT FOR SALE OF LAND.**—If no day be specified for the delivery of the deed and of possession, in a contract for the sale of land, but the money is to be paid after the delivery of the deed, it must be understood that the deed was to be delivered and possession given without delay. If, therefore, on account of a misunderstanding of the parties in relation to the terms of sale, this is not done, the grantor is bound to account for the profits of the land after the contract, and the grantee to pay interest on the money from the time it would have been payable had the deed been immediately delivered. *Id.*

RECORDING.

See MORTGAGES, 9.

RELEASE.

By JOINT OWNER.—Where an action is strictly a personal one, and the plaintiffs are bound to join in it, as in an action of trespass *quare clausum*

Jepp, brought by tenants in common, a release by two of the plaintiffs will be a bar to the action. *Aust v. Hall*, 376.

RESTRAINT OF TRADE.

See CONTRACTS, 16.

SALES.

1. WITHOUT ACTUAL DELIVERY.—A sale of goods without an actual delivery to or possession by the vendee of the goods will vest the property in the vendee as against the administrator of the vendor, if the property be of such a nature and in such a situation that a personal possession is impracticable. Thus, a sale of logs lying in a boom, which were shown to the vendee, was held to be effectual to transfer the right of property. *Jewett v. Warren*, 74.
2. BY SAMPLE.—A sale by sample is tantamount to an express warranty that the article sold is of the same kind as the sample. *Bradford v. Manky*, 122.
3. PROVISIONS FOR DOMESTIC USE.—In the sale of provisions for domestic use there is an implied warranty that they are sound and wholesome. *Van Bracklin v. Fonda*, 339.
4. VENDOR'S LIEN FOR PRICE.—Where goods are sold to be paid for on delivery, if upon delivery the vendee refuses to pay for them, the vendor has a lien for the price, and may resume possession of the goods. *Palmer v. Hand*, 392.
5. VENDEE'S SALE BEFORE DELIVERY.—If before the delivery is completed the vendee sells or pledges the goods to a third person for value, but without notice to the vendor, the lien the latter may have is not affected, and he can recover from such subsequent purchaser. *Id.*
6. BREACH OF WARRANTY, SET-OFF.—In an action for the price of articles sold, the defendant, by way of equitable defense, may give evidence of a warranty of the articles, and a breach thereof, without his having offered to return the articles, or his having given notice to the plaintiff to take them away. *Steigleman v. Jeffries*, 626.

SEARCH-WARRANTS.

DESCRIPTION IN.—A search-warrant, to be valid, must particularly describe the goods to be searched for and the places to be searched. *Sandford v. Nichols*, 151.

SET-OFF.

See NEGOTIABLE INSTRUMENTS, 26; PARTNERSHIP, 6.

SHERIFFS.

1. SUCCESSIVE ATTACHMENTS.—A deputy sheriff cannot make a valid attachment of chattels already attached by another deputy of the same sheriff, although the value may be more than sufficient to satisfy the first attachment. *Vinton v. Bradford*, 118.
2. DESCRIPTION IN SHERIFF'S DEED.—In a sheriff's deed, the land sold must be described with reasonable certainty; accordingly, nothing will pass

under the general clause, "all other, the land, etc., of the defendant." *Jackson v. Delaney*, 464.

2. **DEED BY FORMER SHERIFF.**—A deed made by a sheriff after his commission has expired, for land sold by him when in office, is valid and conveys a good title. *Allen v. Trimble*, 726.

SHIPPING.

1. **FORFEITURE OF WAGES BY DESERTION.**—Where a seaman signs shipping articles, by which he engages not to go out of the vessel until the voyage be completed and the cargo discharged, without leave first obtained, but left the vessel without leave after she was moored in her last port of discharge, and refused to assist in discharging the cargo, he was held to have forfeited his wages by such desertion. *Webb v. Duckingfeld*, 388.
2. **FORM OF SHIPPING ARTICLES.**—The master has no right to insert any stipulation or agreement repugnant to, or inconsistent with, the laws of the United States, but he may add any provision harmonising with them. *Id.*
3. **PRO RATA FREIGHT, WHEN DUE.**—Freight is due *pro rata*, when the consent of the merchant, either by words or actions, has been expressly given, or may fairly be inferred, to accept his goods at an intermediate port. *Gray v. Wain*, 642.
4. **SUIT ON BILL OF LADING.**—The shipper may sue either the master or owner upon a bill of lading signed by the master. *Harvey v. Pike*, 698.

SLANDER.

1. **ACTIONABLE WORDS.**—A charge of drunkenness against a minister is actionable, without a *colloquium* referring to his office or profession, and without proof of special damage. *Chaddock v. Briggs*, 137.
2. **WORDS ACTIONABLE PER SE.**—Words charging a woman with keeping a bawdy house are actionable *per se*; for if true, they would subject her to an indictment as for a crime involving moral turpitude. *Martin v. Stillwell*, 374.
3. **PRIVILEGED COMMUNICATIONS—JUDICIAL PROCEEDING.**—Words spoken before a justice of the peace, on an application for a warrant for felony, are not actionable if spoken in good faith and for the purpose of instituting proceedings. *Bunton v. Worley*, 735.

SPECIFIC PERFORMANCE.

1. **DEPENDING ON PAROL EVIDENCE.**—Where parties entered upon land under a license from the owner, who afterwards gave them a memorandum in writing whereby he promised to sell to them the premises, or give them a lease in fee, and it appeared that these parties were induced to make valuable and permanent improvements, relying upon the representations of the owner that no advantage would be taken of them, it was held that although the memorandum was in itself uncertain, yet as the conduct of the owner was fraudulent as to the parties entering on the premises, parol evidence might be connected with the memorandum to establish a contract, and that a specific performance thereof would be decreed. *Parkhurst v. Van Cortland*, 427.

2. **DENIED.**—Where the remedy is not mutual, or where only one party is bound, a bill for a specific performance of an agreement will not be sustained. *Benedict v. Lynch*, 484.

STATUTES.

1. **REPEAL BY SUBSEQUENT STATUTE.**—A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, will operate to repeal the former statute, although no express words to that effect are used. *Bartlet v. King*, 99.
2. **CONSTRUCTION AND VALIDITY.**—A court of law, when called upon to decide upon the validity of a statute, will presume it to be constitutional until the contrary clearly appears. The legislature is presumed to be the judge, in the first instance, of its constitutional powers, and it is only when manifest assumption of authority, or misapprehension of it appears, that the judicial power should refuse to execute it. *Adams v. Hess*, 216.

STATUTE OF FRAUDS.

1. **GUARANTY WHEN BINDING.**—Where a lease was made to two, reserving rent, and one of the lessees with the lessor executed it, a guaranty of the payment of the rent indorsed upon the lease by a third person, is binding upon the guarantor, although he stated at the time of indorsing that the instrument was not to be binding without the signature of the other lessee. *Adams v. Bean*, 44.
2. **CONSIDERATION OF GUARANTY.**—Permitting the lessees to occupy the demised premises in consideration of such guaranty, is a sufficient consideration for the undertaking of the guarantor. *Id.*
3. **WRITING AND SIGNING MEMORANDUM.**—A memorandum of a contract for the sale of goods was written by the broker employed to make the purchase, with a lead pencil in his book, in the presence of the vendor, and the names of the vendor and vendee, and the terms were stated in the body of the memorandum, but it was not subscribed by the parties. This was held sufficient within the statute of frauds. *Merritt v. Olason*, 286.
4. **CERTAINTY IN AGREEMENTS.**—Every agreement required by the statute of frauds to be in writing, must be certain in itself, or capable of being made so by a reference to something else, whereby the terms can be ascertained with reasonable precision, or it cannot be carried into effect. *Abeel v. Radcliff*, 377.
5. **ENTRY IN AUCTIONEER'S BOOK.**—An auctioneer is agent for the bidder at an auction as well as for the owner of the property, and an entry by him in the auction book, of the name of the bidder, and the amount bid, is a sufficient memorandum in writing to take the case out of the statute, whether the sale be of real or personal property. *Singstack v. Harding*, 669.
6. **CONSIDERATION OF GUARANTY.**—A promise in writing, signed by the defendant, to pay to the plaintiff the amount of a certain note made in plaintiff's favor by a third person, in consideration of the plaintiff's renewal of such note, in case the maker fails to pay at maturity, is a sufficient memorandum in writing to take the case out of the statute. When

the renewal took place, the consideration attached, and the defendant's liability commenced. *Sloan v. Wilson*, 672.

STATUTE OF LIMITATIONS.

1. **STATUTE RUNNING AGAINST INFANT.**—Where the statute has commenced to run in the life-time of the ancestor, an infant heir can claim no protection from his disability. *Jackson v. Moore*, 398.
2. **NO TIME AGAINST COMMONWEALTH.**—The statute of limitations does not run against the commonwealth. *Commonwealth v. McGowan*, 737.
3. **WHEN STATUTE DOES NOT RUN.**—The statute does not run until there is some one in whom the right of action is undubitably vested. *Id.*
4. **STATUTE AFFECTS WHAT.**—The statute bars the remedy but not the right. *Id.*

STOPPAGE IN TRANSITU.

1. **STOPPAGE IN TRANSITU.**—In case of a sale of personal property, not executed by delivery, and to be consummated by a delivery at another place, although in consequence of earnest paid, or otherwise, the property is so vested in the vendee that on complying, or offering to comply, with the contract on his part, he might recover the same from the vendor or his agent; yet, until delivery, and while the goods are *in transitu*, the seller may, on the vendee's becoming bankrupt, or being likely to become so, arrest the goods, or order his agent to arrest them. *Howatt v. Davis*, 681.
2. **FACTOR'S LIABILITY TO PRINCIPAL.**—If the factor or agent having sold goods belonging to his principal, be ordered by him not to deliver them to the buyer, while they are still *in transitu*, there being doubts as to the buyer's solvency, and the factor delivers them notwithstanding such order, and without receiving security, he will be responsible to the principal for the loss sustained by reason of the buyer's insolvency. *Id.*

SUBROGATION.

See LIENS, 2.

SUICIDE.

See CRIMINAL LAW, 4.

SURETYSHIP.

1. **NEGLECTING RELEASING SURETY.**—If the holder of a security payable on demand, is requested by the surety to proceed without delay to collect the money from the principal, who is then solvent, but neglects so to do, and the principal afterwards becomes insolvent and absconds, the surety will be exonerated. *Pain v. Packard*, 369.

TAXATION.

1. **ILLEGAL TAX—MUNICIPAL CORPORATION.**—Towns have no authority to raise money in time of war to pay militia, or for other purposes of defense. *Stetson v. Kempton*, 145.
2. **SAME—LIABILITY OF ASSESSORS.**—Assessors of an unauthorized town tax are liable in trespass for taking property to satisfy such tax, although the assessment may include other sums lawfully laid. *Id.*

2. **TAX SALE.**—A sale by the sheriff of an entire tract of land for taxes on the whole, when a tax is due for part only, is void. *Jones v. Gibson*, 590.

TENDER.

- WHEN SEASONABLE.**—Where a contract is payable at a certain time and place, in specific articles, and the debtor is at the place appointed at a seasonable hour before sunset on the day fixed, prepared to make delivery, and the creditor neglects to attend to receive the articles, a tender after sunset will be good. (GOULD, J.) *Avery v. Stewart*, 240.

TENANCY IN COMMON.

See EXEMPTIONS, 2, 2.

TORTS.

1. **ON HIGH SEAS.**—Actions for personal injuries are of a transitory nature, and follows the person or *forum* of the defendant. Consequently, courts of this state have jurisdiction of actions brought for torts committed on board of a foreign vessel on the high seas, where both parties are foreigners; but it rests in the sound discretion of the court to exercise jurisdiction or not, according to the circumstances of the case. *Gardner v. Thomas*, 445.
2. **ACTIONS WHETHER JOINT OR SEVERAL.**—As a general rule in actions in form *ex delicto*, for a tort committed by several, the plaintiff may sue any of them, and the non-joinder of others cannot be pleaded in abatement; but where the action relates to real property, if it be such as to draw in question the title, all those jointly concerned should be made co-defendants. *Low v. Mumford*, 469.

TRESPASS.

1. **ENTERING DWELLING-HOUSE.**—One who enters a dwelling-house without permission of the occupant, and remains there after being requested to leave, is guilty of a trespass; and if he had permission to enter, and remained after a request to leave, he would then be liable as a trespasser *ab initio*. *Adams v. Freeman*, 327.
2. **INJURY TO FISHERY.**—An action of trespass *vi et armis* is the proper form of action for a direct, immediate and intentional injury to one's fishery; and the fact that the defendant was in the cabin at the time his vessel tore the plaintiff's net, does not alter the case, he being still the master of the vessel. *Post v. Munn*, 570.

See DAMAGES, 2.

TROVER.

- BY WHOM.**—Trover cannot be maintained on the mere possession of a chattel, where it appears the legal title is in another, and that the plaintiff has only a trust. *Laspeyre v. McFarland*, 705.

TRUSTS AND TRUSTEES.

1. **TRUST ESTATE ESTABLISHED BY PAROL.**—The principle that a trust estate cannot legally exist without a declaration in writing, signed by the party who holds the legal estate, does not apply to secret trusts and com-

fidences, created for the purpose of defeating or delaying creditors, which may always be proved by parol. *Hills v. Hunt*, 28.

2. **BY ASSIGNED MORTGAGE.**—When a mortgagee assigned her interest in the mortgaged premises, and promised orally to repay the money and interest, unless the assignee should receive the money from the mortgaged premises, she was held liable as the trustee of the assignee, to the amount of the money so promised. *Id.*
3. **WHEN ONE BOUND BY TRUST IN FAVOR OF ANOTHER.**—A party assigned certain securities in trust to another to satisfy a certain indebtedness, and to hold the balance subject to his order, which trust was accordingly accepted. The assignor afterwards directed the balance of the money received under the assignment to be paid over to a third party. It was held that this party could maintain an action for money had and received against the person holding the money, for the acceptance of the trust was equivalent to an express promise to the person who should be ordered to receive the money. *Weston v. Barker*, 319.
4. **PURCHASE OF LIENS BY TRUSTEE.**—A trustee can derive no benefit from a contract in reference to the subject of the trust. Accordingly, where he purchases a mortgage or a judgment at a discount, which was a lien on the trust estate, he cannot be allowed to derive an advantage from such purchase. *Green v. Winter*, 475.
5. **NOT ALLOWED FOR IMPROVEMENTS.**—Where there was a trust to sell land, to raise money to pay off incumbrances, etc., it was held that a trustee should not be allowed for improvements of the trust estate, though made in good faith, as in building houses and mills, clearing lands and making roads. He is entitled only to necessary expenditures, as for repairs, etc. *Id.*
6. **TRUSTEE'S LIABILITY FOR RENTS AND PROFITS.**—A trustee refusing to account to referees for rents and profits of certain parts of the trust estate, is chargeable with the reasonable income of such rents and profits, in the judgment of the referees. *Id.*
7. **WHEN CHARGEABLE WITH LOSS.**—A trustee agreed to purchase and pay for a farm for the use of the *cestui que trust*, out of the proceeds of the trust estate. He purchased, and gave his bond, secured by a mortgage on the premises; but he refused to pay the bond when due, and procured a foreclosure of the sale of the farm by the mortgagees, at a loss. He was held liable for this loss and for costs of suit. *Id.*
8. **PAROL EVIDENCE OF RESULTING TRUST.**—Where executors were authorized by will to sell land devised to the testator's family on giving security, and they sold the land and employed the money it produced in the purchase of other lands, these circumstances, together with evidence of the declarations of one of the executors, will be sufficient to raise a trust for the family in the lands thus purchased. *Wallace v. Duffield*, 660.
9. **LAPSE OF TIME AFFECTING TRUSTS.**—Although trusts are not strictly within the statute of limitations, yet equity has adopted the principles of that act. *Id.*
10. **PURCHASE BY TRUSTEE.**—A trustee cannot be a purchaser at his own sale. *Singstack v. Harding*, 669.

See WILLS, 6.

USAGE.

TO EXPLAIN WRITING.—Upon a note payable in cotton yarn at "wholesale factory prices," evidence of the usage among manufacturers and dealers is admissible to show the meaning of those terms. *Avery v. Stewart*, 240.

See CORPORATIONS, 2.

USURY.

1. **IN PRIOR CONVEYANCE.**—In real actions, under the general issue of *non disseisin*, a subsequent purchaser may give evidence of usury to avoid a prior conveyance from his grantor. *Hills v. Elliot*, 26.
2. **SALE OF NOTE—USURY.**—The sale of a promissory note, with the seller's indorsement, at a discount exceeding the lawful rate of interest is not usurious if made *bona fide*, and not as a cover for a loan. *Lloyd v. Keach*, 256.
3. **SAME—BURDEN OF PROOF.**—Such sale being *prima facie* valid, the burden of proof rests upon the party who claims that it was usurious. *Id.*
4. **USURIOUS INDORSEMENT—DEFENSE BY MAKER.**—The maker of a promissory note, valid in its inception, which has been indorsed for a usurious consideration, may take advantage of the usury in an action by the indorsee. *Id.*

See MORTGAGES, 5.

VERDICT.

ON SUNDAY.—Where the jury have been unable to agree upon a verdict until the morning of the Sabbath, it is a work of necessity then to receive their verdict. *Van Riper v. Van Riper*, 576.

WASTE.

BY LESSOR.—A tenant is generally responsible for all waste done to the premises, not caused by the act of God or the public enemy, or the acts of the lessor himself. And where a house, which a lessee for a year held under a lease without special covenants, was destroyed by an armed mob, which the lessee had reason to believe would attack the house on account of his using the same for the purpose of distributing a certain newspaper, it was held that the lessee was liable in an action on the case in the nature of waste. *White v. Wagner*, 674.

WATER-COURSES.

1. **ANCIENT WATER-COURSE, RIGHTS TO.**—An owner of land has a legal right to the use of a stream of water which has flowed through it immemorially, and the violation of such right is a private nuisance. *Gardner v. Newburgh*, 526.
2. **DIVERSION OF STREAM—EQUITY JURISDICTION.**—A court of equity has jurisdiction by injunction to prevent the diversion of a stream of water flowing through the plaintiff's land, although he may have a remedy at law. *Id.*
3. **RIGHT OF NAVIGATION.**—The right of navigation in a navigable river is superior to all other rights, and particularly to the right of fishery; but though superior it does not take away the right of fishery; it only limits

it so far as it interferes with the fair, useful and legitimate exercise of the right of navigation. *Post v. Munn*, 570.

WILLS.

1. **BEQUEST TO CREDITOR.**—A bequest to creditor upon a bond for a sum of money less than the amount of the bond, together with certain specific articles, with a devise over of the residue of the property after payment of debts and legacies, will not operate as a satisfaction of the bond debt. *Strong v. Williams*, 81.
2. **BEQUEST TO CHARITABLE USES.**—A bequest to promote the propagation of Christianity among the heathen is not void as against public policy. Nor is such bequest void because there is no court in this commonwealth to compel the execution of the trust; nor for the reason that it was made during the last illness of the testator. *Bartlet v. King*, 99.
3. **UNCERTAINTY AVOIDING BEQUEST.**—A bequest in trust for charitable uses, to certain persons who, at the time of the execution of the will, constituted a voluntary association, is not void for uncertainty, but is available for the individuals then composing such association, but not to their successors. *Id.*
4. **CONDITIONAL DEVISE.**—A devise of an estate to the sons of the testator, "they jointly and severally paying" to his daughters a certain sum within a specified time, is strictly conditional upon the payment of the money within the time limited. *Wheeler v. Walker*, 264.
5. **LIMITATION OVER, VOID.**—In a devise of "all the real and personal estate" of the testator, a limitation over in case the devisee should die without disposing of the same, is void; as the word "estate" vested a fee in the first devisee. *Jackson v. Delancy*, 404.
6. **TRUST ESTATE UNDER GENERAL CLAUSE.**—A trust estate will pass under a general clause in a will relating to the realty, unless the intention of the testator appear from the will to be otherwise. *Id.*
7. **BONDS, MORTGAGES AND NOTES NOT MONEY.**—The testator having devised to his wife "all the rest, residue and remainder of the moneys belonging to his estate at the time of his decease," it was held the word "moneys" must be taken in its ordinary signification, and could not include bonds, mortgages, or other choses in action, as there was nothing in the will showing that the testator intended to use the term in any other than its ordinary sense. *Mann v. Mann*, 416.
8. **EXECUTORIAL DEVISE OF MONEY.**—Money may be the subject of an executory devise; and the limitation over after failure of issue is not too remote if restricted to the death of the first taker. *Scott v. Price*, 629.

WITNESSES.

See EVIDENCE, 6, 7, 16.

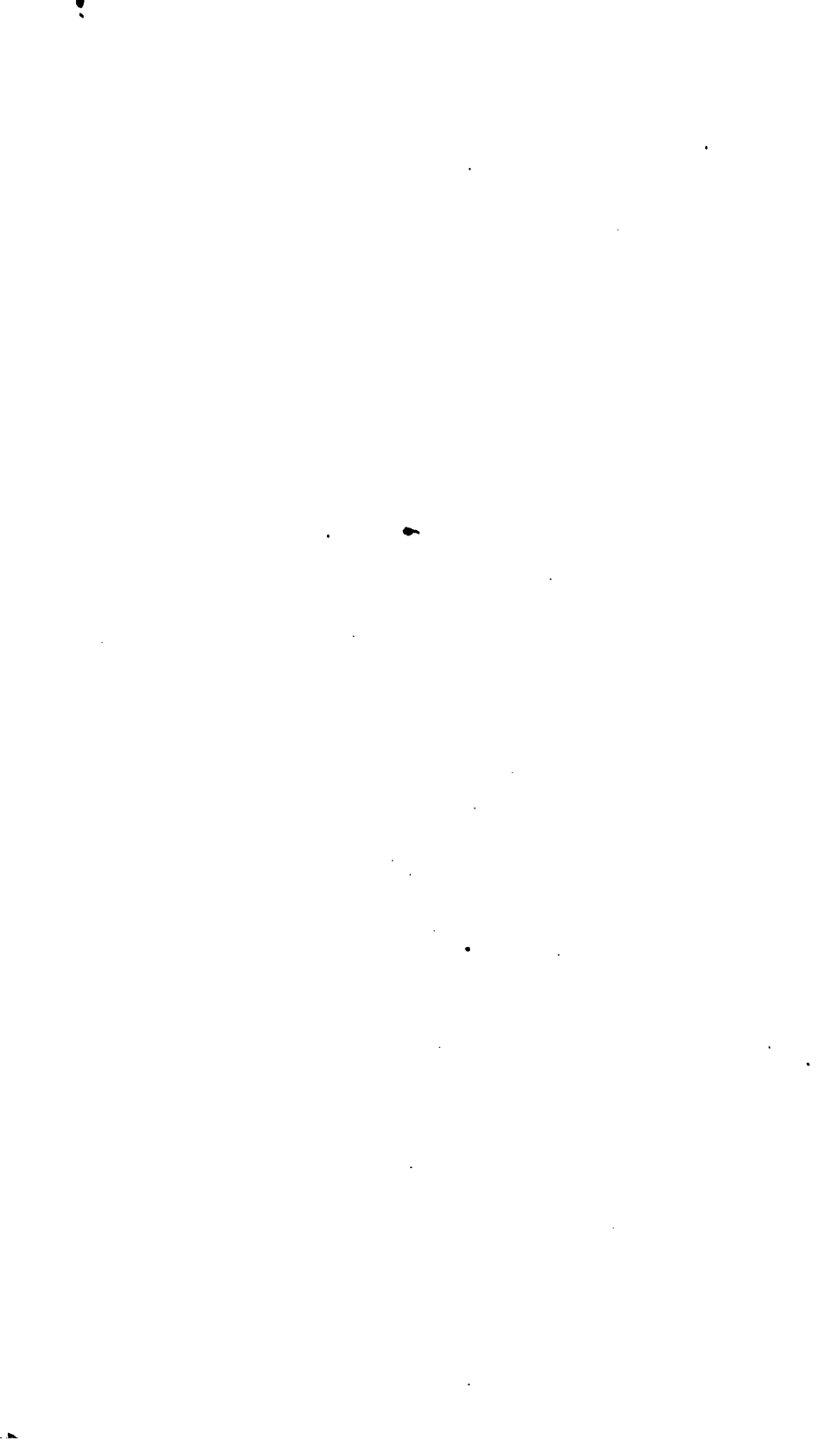


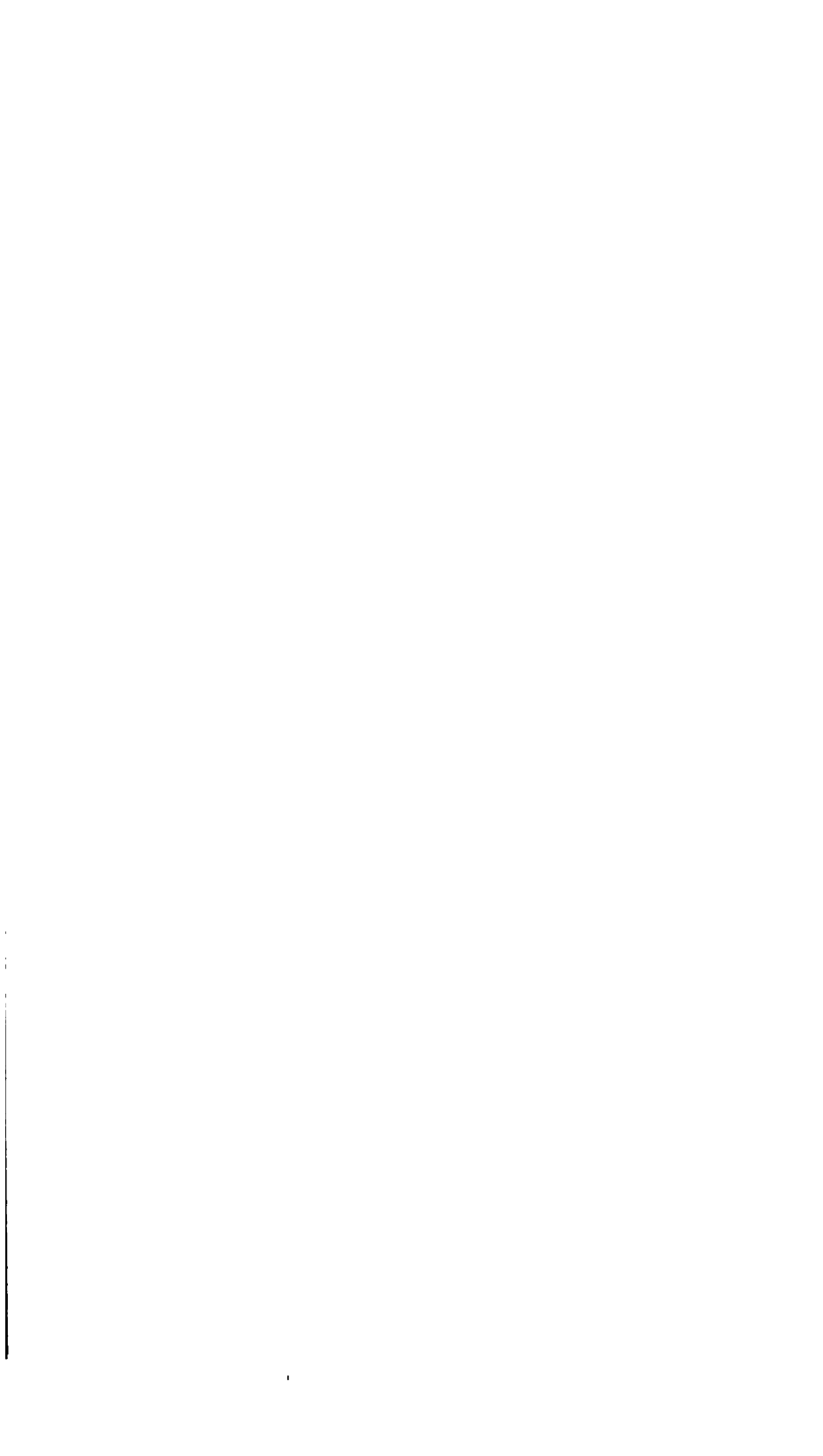


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